

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
The State of Missouri
AT THE
APRIL TERM, 1883.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS
PUBLIC SCHOOLS V. WOODS *et al.*, Appellants

School Board: ITS POWER TO TAKE SECURITY. The board of public schools of the city of St. Louis may lawfully take from a builder contracting for the erection of a school house for the board, a bond for the security of those who may do labor or furnish materials upon the building, and in case of failure of the contractor to pay for any labor done or material furnished upon the building, may enforce the same by action.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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H. M. Wilcox and McComas, McKeighan & Jones for appellants.

The bond is void in so far as it attempts to authorize the plaintiff to bring this suit, because, by the terms of the act of 1833, plaintiff could only contract for the building of the school house and payment therefor. It was not in privity with sub-contractors or laborers; their payment or non-payment did not nor could not affect the plaintiff. A corporation cannot act as a trustee in a matter in which it has no authority, or in a matter that is inconsistent with or repugnant or foreign to the purposes for which it is incorporated. 1 Perry on Trusts, § 43; 2 Dillon on Munic. Corp., (3 Ed.) p. 568, § 573 (443); *Matter of Howe*, 1 Paige 214; *Jackson v. Hartwell*, 8 John. 422. It is against public policy to allow a school board to become trustees of express trusts, and to subject themselves to costs and expenses for strangers. *Bissell v. R. R. Co.*, 22 N. Y. 258.

A. M. Sullivan, Jacob Klein, Seneca N. Taylor and R. E. Rombauer for respondent.

The contract between Woods & Barnes and plaintiff for the erection of a school house, is germane to plaintiff's corporate objects and purposes, and, therefore, within its corporate powers. 1 Dillon Munic. Corp., §§ 371, 372. The demanding and taking security for the faithful performance of the contract by Woods & Barnes, extending in its benefits to the sub-contractors who were to furnish materials or do work upon the building or both, is incidental to the power to make the contract itself. The plaintiff has been constituted, by the defendants, trustee of an express trust in favor of the sub-contractors. The plaintiff had a right to assume this trust. *Chambers v. St. Louis*, 29 Mo. 577; *Hill on Trustees*, (4 Am. Ed.) 48; *Chapin v. School District*, 35 N. H. 445; *Ang. & Ames on Corp.*, (10 Ed.) §§

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167, 168; 1 Perry on Trusts, § 43; *Vidal v. Girard*, 2 How. 188, 190.

MARTIN, C.—This action was commenced on the 12th of September 1877, upon a bond given by defendants to the plaintiff in November, 1872. On the 12th of November, 1872, Stephenson Woods and John W. Barnes, under the name and style of Woods & Barnes, entered into a contract with plaintiff to erect and finish a school house in the southeastern part of St. Louis, for the sum of \$6,977. At the time of entering into this contract said Woods & Barnes, as principals, and Jephtha H. Simpson and Thomas R. Pullis, as securities, the defendants in this case, executed and delivered to the plaintiff their bond in the penal sum of \$8,000. The conditions and covenants of the bond are set out in full in the petition, and are as follows:

“The condition of the foregoing obligation is such, that, whereas, Woods & Barnes have entered into the preceding building contract with the said Board of President and Directors of the St. Louis Public Schools. Now, if they, the said Woods & Barnes, shall well and faithfully perform and fulfill all and every one of the terms, conditions and covenants therein contained, and if they will well and truly pay or cause to be paid, all just claims of sub-contractors or others for work done or materials furnished on said building, whether such claims are made against the Board of President and Directors of the St. Louis Public Schools, or against said Woods & Barnes, then this obligation shall be void, otherwise to remain in full force. * * * * *

And it is covenanted and agreed by and between the parties hereto, that in case of the failure of the said Woods & Barnes to pay or satisfy any just claim against them, for or on account of work done on said building, the said Board of President and Directors of the St. Louis Public Schools, may, if it chooses to do so, either institute suits on this bond to the use of the claimants, or the said board

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may transfer or assign this bond to one or more of such claimants, each of whom may and shall by such assignment acquire a separate right of action against the said principals and securities for the recovery of such damages arising to them respectively from the non-payment of their just claims, and such actions shall be maintainable until the just claims are paid, or until the penal sum herein provided has been exhausted by recoveries in such actions."

The petition then goes on to set out the breaches of the bond, and says that said Woods & Barnes have failed to perform and fulfill the terms, conditions and covenants of the building contract; that they failed and neglected to pay all just claims of all sub-contractors and others for work done and materials furnished on said building. The names of these sub-contractors and material men or laborers are specified in the petition along with the sums due to each, amounting in the aggregate to \$2,304.97. It is alleged that all said sums are just claims in favor of the said several parties as sub-contractors for work done or materials furnished or both, on and for the building contracted for, and that they remain unpaid. It is also alleged that the plaintiff has not made any assignment of its right of action, but brings and prosecutes this suit for the benefit of all the claimants mentioned. The building contract referred to in the petition was filed as a part of it and is set out in the record.

The defendants demurred to the petition, and rest their argument in support of it upon the ground that the plaintiff has no power to sue upon such a bond, that no such power is given in the act which constituted the board a municipal corporation, and that the object and purpose of the bond are matters in which the board has no interest whatever. The circuit court sustained the demurrer, and judgment was rendered in favor of the defendants. On writ of error to the St. Louis court of appeals that judgment was reversed and the cause remanded for further proceedings.

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The defendants have brought the case here on appeal, and ask that the judgment of the court of appeals be reversed and the judgment of the circuit court be affirmed.

I am unable to adopt the conclusion reached by the learned counsel for the appellant, to the effect that the bond now sued on was beyond the powers of the board to accept, or that it "is repugnant or inconsistent with the objects of its creation." By the act of incorporation, the board is vested with "the charge and control of the public schools and all the property appropriated to the use of public schools within said city." It is also empowered "to do all lawful acts which may be proper or convenient to carry into effect the object of the corporation." Laws Applicable to St. Louis County 1872, p. 521, §§ 1, 4.

The board of public schools certainly has the power to build school houses. It has the right to make contracts with contractors for the erection of school buildings. And as germane to these powers, I think it has the right like any other proprietor, to exact conditions from its contractors, which shall tend to secure and pay off the material men and laborers, who unquestionably contribute most to the erection of such buildings. Viewed from the narrow standpoint of private economy, this must be the cheapest way to erect such costly and commodious structures. Otherwise as the statutes furnish no security to material men or laborers in the mechanics' lien law, as against the board, on account of its being a municipal corporation, they will be compelled to add something to the materials and labor going into the school buildings, on the well known principle which prevails throughout the business world, that high prices and high interest always attend bad security. In a wider sense, I think, the bond is germane to the corporate objects of the school board. I think the law is not inclined to deny the board, even if it is a municipal corporation, the satisfaction and ease of conscience which the private citizen is naturally supposed to experience, when he reflects that the structure he dwells in has been entirely

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paid for, from the mason who laid the foundation to the artist who frescoed the ceilings. By a little caution and prudence on the part of proprietors erecting buildings, this pleasing result can always be secured, and I think the school board has the same right to attain it in the conduct of its business that any one else has. I must decline to hold that the school board in the conduct of its business transactions ought to be controlled by such a phlegmatic sense of justice toward its builders, as the learned counsel for the appellants think so appropriate to it as a public corporation. The object and purpose of the bond being entirely within the powers of the board, and the board being constituted the trustee of an express trust in the bond, the right to sue on it ought not to be questioned.

The judgment of the court of appeals reversing the judgment of the circuit court and remanding the case for further proceedings, is affirmed. All concur.

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RAILWAY COMPANY *et al.*, Appellants.

1. **Taxation of Railroads:** NORTH MISSOURI RAILROAD. Until the act of March 10th, 1871, providing a uniform system of assessing and collecting taxes on railroads, railroad property was not by the general law subjected to taxation *in specie*. The only form of taxation provided for was a tax against the share-holders upon their shares; and for this there was no lien on the property of the company. This was the mode of taxation applicable to the North Missouri Railroad Company. NORTON, J., dissented.
2. —: **BACK TAXES: INNOCENT PURCHASER.** A general act provided for the levying of taxes on railroad property for back years. After its passage the North Missouri Railroad changed ownership. Its property had not been subjected to taxation during those years. After the purchase a levy was made under the new act. *Held*, that as against the new owner the levy was of no validity. He was an innocent purchaser, and the act was retrospective and void as to him. NORTON, J., dissented.

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3. — : NORTH MISSOURI RAILROAD. The act of March 17th, 1868, amending the charter of the North Missouri Railroad Company did not have the effect of subjecting the property of that company to taxation as real and personal property. It made it liable to be so taxed; but nothing in the act changed the method of taxation provided by the general revenue law, which was a tax against the shareholders on their shares.
4. — : TAXATION PREVIOUS TO 1872. The special board of equalization created by the act of March 10th, 1871, was not authorized by that act to levy taxes for the year 1871, or previous years on the real and personal property *in specie* of any corporation which had not before that act been subjected to taxation in that form.

Appeal from St. Louis Court of Appeals.

REVERSED.

Wells H. Blodgett for appellants.

As against an innocent purchaser a tax is not a lien until after it is levied, and it is shown by the record in this case that said defendant acquired the property on February 6th, 1872, and that said taxes were not levied by the county court of St. Charles county until long after said date. *Heine v. Levee Commrs.*, 19 Wall. 659; *Cooley on Tax.*, (1 Ed.) 305; *Hilliard on Tax.*, 463, § 63; *Ream v. Stone*, 102 Ill. 359. There is nothing in the statute under which the taxes in question were assessed from which it can be fairly said that the legislature intended to create a lien in favor of the State and county for such "back taxes" as are sued for in this action. Had that been the intention, appropriate words to that effect would have been employed. In the absence of a plain expression of such intention the statute will not be construed to have such retroactive effect. *Sedgwick on Stat. and Con. Law*, (1 Ed.) 190; *Woart v. Winnick*, 3 N. H. 477; *Towle v. Eastern R. R. Co.*, 18 N. H. 547; *Willard v. Harvey*, 24 N. H. 344; *Wade on Retroactive Laws*, § 194. Prior to the act of March 10th, 1871, and during all the years in question, the revenue laws of the State required all taxes against corporations to be

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levied on the shares of their capital stock, and not on their property, and declared such taxes a lien on said shares and not a lien on their property, and hence if the act of March 10th, 1871, was intended by the legislature to authorize taxes to be levied from 1862 to 1871 on property which was not the subject of taxation during said years, then said act was to that extent retrospective and void under the constitution of the State. R. S. 1855, p. 1331, §§ 30, 31, 32; *Ib.*, p. 1342, §§ 25, 26; Gen. St. 1865, p. 103, §§ 27, 28, 29; *Ib.*, p. 113, §§ 28, 29; Const. Mo. 1865, art. 1, § 8; Sedgwick on Stat. and Con. Law, 190. Both methods of taxation cannot be enforced at the same time, as it would amount to double taxation. *H. & St. Jo. R. R. Co. v. Shacklett*, 30 Mo. 558; *Tallman v. Butler County*, 12 Iowa 531. By section 6 of the amended charter of the North Missouri Railroad Company all the property of said company was by statute made and declared to be personal estate, and as such was vested in the respective share-holders of said company, in proportion to the number of shares held by each, and it appearing from the record that all said property remained personal estate, and as such vested in said share-holders until the sale of said road to Jessup, on August 6th, 1871, it was not competent for the legislature (as against the St. Louis, Kansas City & Northern Railway Company, who purchased February 6th, 1872), to authorize said property to be afterwards assessed or taxed as real estate, for the same years said property had been by law declared to be personalty. If the shares were taxed, then no further assessment of the property for the same year could be made. To tax the shares was to exempt the property represented by the shares. *H. & St. Jo. R. R. Co. v. Shacklett*, 30 Mo. 558; *Tallman v. Butler Co.*, 12 Iowa 531; *Middlesex R. R. Co. v. Charlestown*, 8 Allen 333; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *State ex rel. N. J. R. R. Co. v. Haight*, 34 N. J. L. 319.

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Wm. A. Alexander and *H. C. Lackland* for respondent.

There can be no question about the constitutionality of the act of 1871. *State v. Severance*, 55 Mo. 378; *Washington Co. v. R. R. Co.*, 58 Mo. 375; *Pacific R. R. Co. v. Watson*, 61 Mo. 57; *State v. R. R. Co.*, 60 Mo. 143. The lien and liability for taxes had been a charge on the property ever since 1862. It could not be evaded by a transfer. The policy of the law will not permit taxes to be evaded in any manner whatever, as long as the property is in sight and can be followed. *Wellshear v. Kelley*, 69 Mo. 343; *State v. Heman*, 70 Mo. 441; *s. c.*, 7 Mo. App. 420. The North Missouri Railroad Company is and has been since August, 1871, insolvent. The act of 1871 was notice to all the world (if notice was necessary) of the State's intention to enforce its lien for itself and all its municipalities. The lien for taxes is necessarily prior to all other liens, and the lien for the last year is prior to all other years. On no other principle could the government be maintained, and the burthen of taxation be made to bear equally and justly on all alike. Under all the laws from 1855 down, the taxes were treated as debts due from the corporation, and not from the share-holders. There is nowhere anything to exempt the property of the North Missouri Railroad Company from taxation or to require it to be assessed to the share-holders. On the contrary, the law required the stock and property to be assessed against the corporation; and it looked to the corporation for the payment of the taxes, and not to the stockholders. But the property was not assessed in any shape. If it be maintained that it ought to have been assessed in shares, then it is evident that the company was derelict in its duty in not delivering a list of the shares to the assessor; and the company cannot now be heard to complain that the property was not assessed in that way. According to the theory of the defendant, the shares represent the property, and the property repre-

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sents the shares; and theoretically in law they are both equal in value; one is the equivalent of the other. The result ought to be the same in either case, whether we assess the property or the stock. It must be conceded that the State has power to tax one, or the other, or either, at its pleasure, interchangeably. Now even if it be conceded that the laws in force for the years in question, required the property to be assessed in shares; yet, if by the neglect of the officers of the company, it was not done, we are unable to see that there is any principle of law to prevent the legislature from afterwards assessing the property instead of the shares for the years omitted. *State v. Dulle*, 48 Mo. 282; *St. Joseph v. R. R. Co.*, 39 Mo. 476; *State v. R. R. Co.*, 60 Mo. 143; *St. Louis M. L. Ins. Co. v. Charles*, 47 Mo. 462, 466, 467; *H. & St. Jo. R. R. Co. v. State Board*, 64 Mo. 294, 307; *Cooley on Tax.*, pp. 221, 222, 223, 228 to 230; *State R. R. Tax cases*, 92 U. S. 576. *Bailey v. Maguire*, 22 Wall. 229; *Tucker v. Ferguson*, 22 Wall. 527, 575; *West Wis. R'y Co. v. Supervisors*, 93 U. S. 595; *Grim v. School District*, 57 Pa. St. 433.

HENRY, J.—This suit was instituted in the circuit court of St. Charles county against the defendants for the recovery of taxes levied upon the railroad and other real and personal property of the North Missouri Railroad Company in 1872, for ten years, from 1862 to 1871, inclusive. The property in question, prior to 1872, had not been assessed for either of those years, and the levy in 1872 was made under an act of the legislature, approved March 10th, 1871. After that act was passed, and before the levy of the taxes sued for, the North Missouri Railroad and all the other property of that corporation, were sold and conveyed to Morris K. Jessup, who subsequently sold and conveyed the same to the St. Louis, Kansas City & Northern Railway Company. Defendants had judgment in the circuit court, which, on appeal to the St. Louis court of appeals, was reversed, and they have appealed to this court.

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Was the property, as contradistinguished from the capital stock of the company, subjected to taxation for any of the years from 1862 to 1871, inclusive? This is the controlling question in the case.

By an act of the legislature approved January 7th, 1853, amendatory of the act incorporating the North Missouri Railroad Company, it was provided that "the capital stock, together with all machines, wagons, cars, engines or carriages belonging to the company, together with all their works and other property, and all profits which shall arise from the same, shall be vested in the respective shareholders of the company forever in proportion to their respective shares, and the same shall be deemed personal estate and be exempt from any public charge or tax whatsoever, for the period of five years after the passage of this act." Sess. Acts 1853, p. 323, § 6. By this act, the capital stock and all other property of that corporation were exempt from taxation until January 7th, 1858, and after that date as long as section 6 of the act of 1853, *supra*, remained unrepealed, the property of the company was subject to taxation only as personal property in a manner to be prescribed by the general assembly. *Bangor & Pisc. R. R. Co. v. Harris*, 21 Me. 233. By the express declaration of the statute, all its capital stock and other property was vested in the holders of the stock forever as personal property. By the revenue law in force when the period for which the property was exempt from taxation expired, it was provided that: "For the support of the government, etc., a tax shall be levied on the following objects, *

* shares of stock in incorporated companies at their cash value, excepting manufacturing companies, the property of which alone shall be taxed, * * all property owned by incorporated companies, over and above their capital stock."

It is clear that by that law the property of the corporation, except such as it owned over and above its capital stock, was not subjected to taxation. The State could

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have taxed either the capital stock, or the property of the corporation, and might have imposed the tax on the shareholders, or against the corporation, on the aggregate of its capital stock. It may be conceded, only for the purpose of the argument, what has never been held by any court, that it could have subjected to taxation the shares of individual stockholders, the capital stock, and the property, but the question is, had the legislature, up to 1871, seen proper to do so?

That property is subject or liable to be taxed, and has been subjected to taxation, are not one and the same thing. Prior to the adoption of the constitution of 1865, the legislature frequently exempted property from taxation by express enactment. All the property in the State was subject to taxation, and such as was exempted by statute, like that of the North Missouri Railroad Company, might have been subjected to taxation, or in other words, was liable to be taxed, but was not subjected to taxation, but exempted. From 1858 to 1871 the property in question, as real and personal estate, was not subjected to taxation, and without a repeal of section 6 of the act of 1853, was not subject to taxation, except as personal estate.

In lieu of a tax against the property of the corporation, the State imposed a tax upon the shares of its capital stock owned by individuals, and sections 17, 18 and 19 of the act of 1857, which were retained in every revenue law passed until 1871, provided as follows: Section 17. Persons owning shares of stock in banks and other incorporated companies taxable by law, are not required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation shall deliver to the assessor a list of all shares of stock held therein and the names of the persons who hold the same. Section 18 provides that the taxes on such shares shall be paid by the corporations respectively, and gives the corporation a lien on such shares respectively, for the amount so paid, and section 19 imposes a forfeit of \$1,000 upon the president or other chief

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officer who shall fail to comply with section 17. That the taxes thus levied were levied against the individuals owning the stock, and not against the corporation, would seem to be a legitimate conclusion from those provisions in connection with section 1 of the same revenue law, which expressly declared that the tax should be levied "on shares of stock in incorporated companies at their cash value." Section 17 exempts persons owning shares of stock from the duty of delivering to the assessor a list thereof. Section 18 speaks of the taxes assessed on "shares of stock embraced in said list," and requires the corporation to pay the tax, and authorizes it to "recover from the owners of such shares the amount so paid, or deduct the same from the dividends accruing to such shares," and gives the corporation a lien on such shares respectively. If it was the purpose to levy the tax against the corporation, on its capital stock, there was no necessity for any mention of individual stockholders; still less for giving the corporation a lien upon its own property for a debt due from itself. The fact that the corporation was required to pay the tax on the shares, does not alter the character of the tax. *Burroughs on Taxation*, 171; *National Bank v. Commonwealth*, 9 Wall. 360.

But, it is contended, that if this was a tax against the share-holders, the corporation has escaped taxation entirely. This argument overlooks the fact that taxing the shares of individual stockholders is one way of taxing the property of the corporation. Taxing the shares against the stockholders, and also the capital stock, or the property represented by the capital stock is duplicate taxation. *State v. Branin*, 23 N. J. L. 484; *National Bank v. Commonwealth*, 9 Wall. 360; *Angell & Ames on Corp.*, (8 Ed.) §§ 460, 461; *Smith v. Burley*, 9 N. H. 423; *Middlesex R. R. Co. v. Charlestown*, 8 Allen 330; *Gordon v. Baltimore*, 5 Gill 231; *Baltimore v. B. & O. R. R. Co.* 6 Gill 288; *Am. Bank v. Mumford*, 4 R. I. 478; *Providence Institution v. Gardiner*, 4 R. I. 488; *Burroughs on Taxation*, 174.

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Mr. Burroughs says: "When the question is one as to the intention of the legislature, the argument that a tax on capital and shares is double taxation, is one of great weight, and the intention will not be imputed, unless the language is clear and explicit." Judge Cooley, in his work on the same subject, says: "A construction of the law is not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute, or by necessary implication." Cooley on Taxation, 165. Some of the authorities above cited go further, and hold that a tax imposed on both the shares of stock against the share-holders, and also on the capital stock against the corporation, is unconstitutional. Angell & Ames; *State v. Branin, supra*. Not only was there no clear expression of legislative intent, within the years 1862 to 1871, to tax both the individual shares and the capital stock, or the capital stock and the property, but section 1 of the act of 1857, and sections 17 18 and 19 of that act, manifestly express a contrary intent.

But even conceding that the tax levied under that, and succeeding revenue laws of the same import, was a tax against the corporation on its capital stock, there was no law prior to 1871 imposing taxes on both the capital stock of corporations and their other property, except such as they may have owned over and above their capital stock. Such taxation would be double taxation, and although many cases may be found which hold that double taxation is not necessarily unconstitutional, all are agreed that no revenue law is to receive such a construction, unless the express words of the statute require it, or it is forced by necessary implication. The 1st section of the revenue law of 1857, requiring the tax to be levied on the shares of the capital stock, and on property owned by corporations over and above their capital stock, as effectually exempted the property from taxation as if it had been expressly so provided, and if the tax levied were against the individual

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owners of the shares, it was equally a legislative exemption of the capital stock in favor of the corporation.

If the assessment provided by sections 17, 18 and 19 of the act of 1857, was a mode of levying the tax on the capital stock against the corporation, was the tax a lien on the property of the corporation?

While the capital stock represents the property and the property the capital stock of the corporation, the one is not the other. A tax levied on the railroad and rolling stock, would not be a lien on the capital stock, in the absence of an express provision of law, certainly not under a law declaring a lien on property for the taxes levied thereon. There is no more reason for holding a tax on the capital stock to be a lien on the other property of the corporation. The other property of the corporation is the capital stock, in the same sense that the capital stock is the other property. In one sense, a tax on the capital stock is a tax on the property. The State had the option to levy it on the property directly, or indirectly on the capital stock, or shares of capital stock. It makes no difference to the State which mode she selects, but the mode selected makes a very serious difference with an innocent purchaser of the property. Certainly a tax against the share-holders on their respective shares, would not, in the absence of an express provision of law, be a lien on the capital stock, and yet it is a mode of taxing the capital stock. The shares of the respective share-holders represent the aggregate of the capital stock no less than the capital stock represents the other property of the corporation. We are of the opinion that there was no lien upon the property of the North Missouri Railroad Company, other than that on the shares of the capital stock given to the corporation; that there was no lien, or any way of obtaining a lien for State or county taxes, either on the capital stock, or property of a corporation, for State or county taxes prior to 1871.

Is it within the power of the legislature, as against an

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innocent purchaser of property, after his purchase, to levy taxes for years before he purchased, and declare a lien therefor on the property which was not subjected to taxation for those years?

We concede the right of the legislature to change the mode of taxing any property which has been subjected to taxation. For instance, if the legislature should, as it might, provide for levying taxes on the income from land, instead of the land itself, it might change the mode to a direct tax against the land as between the original owner and the State; but suppose the tax on the income were not declared a lien on the land, and the original owner should sell the property, would it be competent for the legislature afterwards to change the mode and levy the unpaid income tax upon the property, and declare it a lien thereon against the purchaser? This would be a retrospective law, impairing the obligation of the contract between the grantor and the grantee of the land, imposing burdens upon the latter which the former should have borne, for which the grantee would have no remedy against his grantor on the covenant against incumbrances, or any of the usual covenants in a deed, because the tax was not an incumbrance on the land when the deed was executed, but a mere personal charge against the grantor. It would be in effect, to charge one with a pecuniary debt or obligation which rested upon another. There is no warrant in the constitution for such legislation.

The case at bar is stronger against the act of 1871, if it receives the construction contended for by respondent's counsel, than the case supposed, for by that construction, not only the mode but the subject of taxation was changed, so as to impose upon a purchaser a liability, and upon his property a lien, neither of which existed when he made his purchase.

With respect to the taxes in controversy, for the years 1868 to 1871, inclusive, another question is presented. By an act of the legislature, approved March 17th, 1868,

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amendatory of the charter of the North Missouri Railroad Company, it was declared that: "The North Missouri Railroad and the west branch thereof when completed to Kansas City, shall be subject to taxation on the cash value thereof at the rate assessed by the State on other real and personal property of like value." Conceding, as contended by respondent's counsel, that this operated to repeal section 6 of the act of 1853, which declared that the property of the North Missouri Railroad Company should be vested in the share-holders forever, and be deemed personal estate, and that the general assembly thereafter, if it saw proper, could tax it as real and personal estate, according to its value and character, was there any law in force, in either of the years 1868 to 1871, which required the taxation of that property?

The revenue law for those years, differed in its phraseology from previous revenue laws with respect to the enumeration of property to be taxed. Former laws specifically named the kinds of property to be taxed, while the act of 1865, following the constitution of 1865, declared, in effect, that taxes should be levied on all property, real and personal. That constitution contained an inhibition against the exemption of any person or corporation from taxation. It however did not repeal the 6th section of the act of 1853. That was not effected until the amendatory act of 1868 was passed and accepted by the corporation, if then. While the revenue law of 1865 declared that all property, real and personal, should be taxed, it contained the same provisions with regard to the mode of taxing the capital stock of corporations, as the revenue law of 1857, above quoted. Sections 27, 28 and 29 of the revenue law of 1865, (R. S. 1865, p. 103,) are identical with sections 17, 18 and 19 of the act of 1857. Those sections of the act of 1857 prescribed a mode of assessing the capital stock of corporations, whose other property was exempt by the very terms of the law. The retention of the same sections in the act of 1865, is conclusive that the legislature in-

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tended to adopt the same mode of levying taxes on the capital stock of corporations.

That it was competent for the legislature to choose between the different methods of taxing the property of corporations, we think clear, notwithstanding the constitution and the law of 1865 required all property to be taxed. It could not have been intended by the constitution or the law, that corporations should be taxed on both their capital stock and property represented by that capital stock, or that the legislature should be restricted to the one mode or the other. The option still remained with the legislature to impose the tax on the capital stock or the other property, and that option it did exercise by imposing the tax, from 1865 to 1871, on the shares of the capital stock.

The act of 1868 did not subject the property of the North Missouri Railroad Company to taxation. It made it subject, liable to be taxed, as real or personal property, according to its actual value. This is all that can be claimed for it. That act had no more the effect to tax the property, than the constitution of 1865 to tax all the railroad property, and property of banking and other corporations in the State. Section 36, article 11 of that constitution, provided that: "No property, real or personal, shall be exempt from taxation," except public school property, property owned by the United States, this State, or counties or municipal corporations within this State. The effect of that section was to require the legislature to tax all property, except that embraced in the exceptions, and the construction placed by respondent's counsel on the act of 1868, which, if correct, applies as well to the constitution of 1865, would require the legislature to levy taxes on the property, real and personal, of all corporations, and yet until the act of 1871, the shares in the capital stock only, and not the property, was subjected to taxation. That section of the constitution applies with as much force to the property of other corporations, as the act of 1868 to the property of the North Missouri Railroad Company,

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but the property of other corporations, as contradistinguished from capital stock, was not subjected to taxation until the passage of the act of 1871. It was subject, liable to be taxed, but the legislature, in its discretion, saw proper to tax the capital stock instead, which, it is conceded, was within the legislative discretion. It could choose either one of the modes, that of taxing the property, the capital stock, or shares of capital stock, and having selected one, with no intention expressed to tax either of the others, there can be no pretense that either of the others has been subjected to taxation.

Whether the capital stock of the North Missouri Railroad Company, or the shares of that capital stock, were in fact taxed for the years 1862 to 1871, is of no importance in the determination of the legal questions involved.

The shares of the capital stock only, were subjected to taxation; and under the act of 1871, the board of equalization was not authorized to levy the taxes in question upon the road-bed, rolling stock and other real and personal property of the North Missouri Railroad Company even if it had been within the constitutional power of the general assembly to authorize it. By selecting the shares of the capital stock for taxation, and not including the capital stock of the corporation or its other property as objects of taxation, they were as clearly exempt, under the authorities above cited, as if exempted by express terms. That act provided a method of assessing taxes against railroad corporations different from that which had previously prevailed, requiring the president or other chief officer to furnish to the State Auditor a statement in detail of all the property of the company, including road-bed, rolling stock, etc., upon which taxes were thereafter to be levied; and section 3 of the act reads as follows: "In case any such railroad or other property of any such company heretofore specified shall have been subjected to taxation, prior to the passage of this act for any year for which it shall not have been assessed and paid taxes, then

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a separate return for each year for which taxes shall not have been paid, shall be made as herein required." It is not that "if any railroad company" shall have escaped taxation, but "if any such railroad or other property of any such company," shall have escaped. By its express terms, this section, the one under which the taxes in question were levied, related only to property, which, prior to its passage, had been subjected to taxation and escaped it, and the board of equalization was not by that section, authorized to levy back taxes upon property which had not theretofore been subjected to taxation. There may have been railroad property subjected to taxation which had escaped. The capital stock, or shares thereof, or property owned by such corporations over and above their capital stock, may have escaped taxation; and whether the property of the North Missouri Railroad Company, or its capital stock, or shares thereof had, or had not escaped taxation, there was no authority conferred upon the board of equalization to levy back taxes which should have been assessed by law for the years from 1862 to 1871 against the shares of the capital stock, or the capital stock, upon other property of the North Missouri Railroad Company, which, prior to 1871, had not been subjected to taxation.

Jessup was an innocent purchaser. True, he purchased after the passage of the act of 1871, prior to the levy of the taxes in question, but that act gave him no notice, actual or constructive, that the North Missouri Railroad Company was in arrears to the State or county of St. Charles for taxes, certainly not for taxes chargeable against the property purchased by him upon which no law had imposed taxes prior to that date. It is immaterial, however, what, if any, notice Jessup or the St. Louis, Kansas City & Northern Railway Company had, that the North Missouri Railroad Company had not paid the taxes for the years named, levied upon the capital stock, or shares thereof, if our views on the other questions considered are correct.

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The judgment of the court of appeals is reversed. HOUGH, C. J., and RAY, J., concur; NORTON, J. dissents.

SHERWOOD, J.—I did not have the advantage of hearing the oral argument in this cause. At present I incline to concur in the above opinion as to the period prior to the act of 1868; as to the time subsequent to that period, I am in more doubt. I will examine the whole matter hereafter and write a separate opinion.

NORTON, J.—Not being able to reach the conclusion arrived at by a majority of the court, owing to the exceptional importance of the case and the principles involved, I deem it proper to state the ground for my dissent.

It is so clear that no argument is necessary to show, that after the expiration of five years from the passage of the act of 1853, exempting the North Missouri Railroad Company from taxation for that period, that it was liable to be taxed after that time. Under the law in force at the time said corporation became subject to taxation, viz: in 1858, it was made the duty of "its president or chief officer to deliver to the assessor a list of all shares of stock held therein, and the names of the persons holding the same." It was also provided, that "the taxes assessed on the shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

It appears in this case that from the years 1862 to 1871 inclusive, the said North Missouri Railroad was neither assessed according to the above mode of assessment, nor any other mode, and that for the said years it escaped taxation entirely, although subject to it. There was no change made by the general assembly till 1868 in the method of assessing the North Missouri Railroad Company, at which

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time it was provided in section 4, Acts 1868, page 113, that "the North Missouri Railroad, and the western branch thereof when completed to Kansas City, shall be subject to taxation on the cash value thereof at the rate assessed on other real and personal property of like value." After the passage of this act the North Missouri Railroad was no longer liable to be assessed on its value as ascertained by the capital stock, but on the cash value of its property as other property. The only difference between the laws of 1855, 1863 and 1865 taxing corporations, and the law of 1868, *supra*, relating to the taxation of the North Missouri Railroad, as I construe them, was in the method of ascertaining the value of its property. Prior to 1868 its value was measured and ascertained by the amount of its capital stock, but when it was so ascertained, the tax imposed was a tax which the corporation was required to pay, and to which the State looked alone for payment. The property of the corporation was the substance, the capital stock the shadow. It was the substance and not the shadow intended to be taxed by the legislature. After the act of 1868 was passed, the capital stock was no longer the measure of the value of the property of said company, but by that act the cash value of the property was to govern in the assessment and levy of taxes. In the case of the *State v. Hann. & St. Jo. R. R. Co.*, 60 Mo. 143, it was held that it was within the power of the legislature to change the method of assessing railroad corporations.

The North Missouri Railroad was neither assessed under the law of 1868 nor the laws in force prior thereto for the years 1862 to 1871 inclusive, and in 1871 the general assembly passed an act to provide for a uniform system of assessing and collecting taxes on railroads, the 3rd section of which is as follows: "In case any such railroad or other property of any such company heretofore specified shall have been subjected to taxation prior to the passage of this act for any year for which it shall not have been assessed and paid taxes, then a separate return for each

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year for which taxes shall not have been paid, shall be made as herein required." This section, in my judgment, is not susceptible of any other construction than that when a railroad shall have been subjected—that is, liable—to taxation, and had neither been assessed nor paid taxes, for any preceding year, that for such omitted year or years it shall be required to pay. The North Missouri Railroad, being liable to taxation for the years 1862 to 1871 inclusive, and not having been assessed for those years, either on its value as ascertained by its capital stock, or on its cash value as other real and personal estate, under the provision of the act of 1871 above quoted was liable to assessment and taxation for the years thus omitted.

That it was within the power of the general assembly, when property either real or personal, liable to taxation, had neither been assessed nor taxed for any year or years for which it might and ought to have been assessed and taxed, to provide for the assessment and taxation of the property for such omitted years, is, I think, evident. The principle is so consonant with every sense of justice and right, that it needs no citation of authorities to establish it. All property protected by the government and not expressly exempted from taxation, must, under the constitution and laws of our State, contribute to its support and maintenance, and these contributions are called for through the exercise of the taxing power, with which the legislative department of the government has been fully clothed. Taxes when imposed for general revenue are for protection afforded to person and property, and such taxes will always become odious if they are to be borne by the honest and well-disposed citizens alone, and avoided through fraudulent evasions of the law in not returning their property for assessment, or paying the taxes when levied, by those who are willing to receive the protection of the government without paying any of the cost of conducting it or bearing their due proportion of its burdens. Taxes are imposed annually, and required to be paid annually, to de-

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fray the annual expenses incurred in affording protection, and when any property subject to be taxed has been omitted for any year or years during which it has been protected, the general assembly has as much power to authorize the assessment of such property and the collection of taxes thereon, as they had in the first instance to impose the tax, and the assessment when made and the taxes when levied relate back to the time when the property should have been assessed, and attach as a lien binding the property and superior to all intervening incumbrances.

The doctrine upon the subject is stated by Mr. Blackwell as follows: "The State has a lien upon land for taxes actually levied, and also for such as were properly chargeable upon the land, but by reason of the neglect of the officers intrusted with the duty of assessing it the land was omitted in the list of a particular year. 'Back taxes' as they are called may, therefore, be assessed and collected with the taxes of the current year, although the land upon which they are chargeable has passed into the hands of a *bona fide* purchaser. This power grows out of the necessities of the government, and the nature of a tax lien, which admits no property in the citizen while the tax remains unpaid, and regards the land as a pledge, perpetual in its character, to pay the debts and current expenses of the government. It would be a violation of principle to hold that a public right shall be lost by the mere neglect or delay of the public agent to enforce it, and in the absence of a statute expressly limiting the time in which it may be done, back taxes may be collected at any time. The State is never guilty of laches. In many cases it is expressly provided that assessments and reports of delinquents shall be made not only of taxes for the current but for the preceding year or years. Where such is the language of the law, the right to collect back taxes is clear." Blackwell on Tax Titles, (4 Ed.) p. 184.

So it was said by this court in the case of *Keating v. Craig*, 73 Mo 508 that "the lien of a special tax-bill, like

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the lien for general taxes, is superior to any incumbrance, subsequent or prior to the levy of the tax with which the owner may charge the land." It has also been held in the following cases that if A convey his land to B by deed containing covenants against incumbrances, that A could be held liable to B under his covenants for the taxes on said land, although the land had neither been assessed for taxation nor the tax levied at the time of the sale and date of the deed; and the only principle upon which these rulings can be upheld is, that the taxes, although not assessed at the time of the sale, became, when they were assessed and levied, an incumbrance and lien upon the land which A by his covenant was bound to remove. *Blossom v. Van Court*, 34 Mo. 394; *Anderson v. Holland*, 40 Mo. 600; *McLaren v. Sheble*, 45 Mo. 130. So also in Minnesota, *Webb v. Bidwell*, 15 Minn. 479. So also in Massachusetts, *Cochran v. Guild*, 106 Mass. 29. So also in case of *State to use of Rosenblatt v. Heman*, 70 Mo. 441, in which, after a careful consideration of the subject, it was expressly held that the revenue law of 1865 gave the State a lien upon real estate for taxes, and as respects this question the revenue law of 1855 is substantially the same as that of 1865. But more than that, the act of 1871 gave an express lien on the property of corporations for the taxes which the act authorized, and embraced, as I construe it, the taxes sued for in this case.

The following principle may be deduced from the authorities above cited, viz: that when property is liable to taxation, and which has neither been assessed nor taxed for any year or years for which it was liable to be assessed and taxed, but has been entirely omitted for such year or years, that it is within the power of the legislature to provide for the assessment and taxation of such property for the omitted year or years, and when such assessment is made and the tax levied, such assessment and levy relate back to the time when it ought to have been made, and the tax becomes a lien on the property which is enforce-

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able against it although it may have passed into the hands of a *bona fide* purchaser before such assessment and levy were made.

I am unable to perceive how, under the operation of this principle, the property of the North Missouri Railroad Company which was liable to taxation for the years 1862 to 1871 inclusive, and which the record in this case shows was neither assessed nor taxed for any of those years, cannot be subjected to the payment of the taxes for those years, which the State in this suit is seeking to enforce against it—even conceding (which I however deny) that Jessup and the St. Louis, Kansas City & Northern Railway Company were innocent purchasers. My opinion is, that they were not innocent purchasers for the following reason: The act of 1871 which authorized the assessment and levy of taxes on the property in question, was passed in March, 1871, five months before Jessup bought the property, his purchase having been made in August, 1871, and more than ten months before the St. Louis, Kansas City & Northern Railway Company purchased of Jessup, the said company having purchased of him in February, 1872, on the first day of which month under the act of 1871, it was made the duty of said company to make separate returns for each year it had neither been assessed nor taxed. Both of the said purchasers were then distinctly notified of the State's claim, and they are presumed to have known the state of the law concerning the identical property with which they were dealing and the liability of the property to assessment and taxation for the years it had not been either assessed or taxed. Especially so, as the said act of 1868, which notified them that the property of the North Missouri Railroad Company would be taxed on its cash value, constituted the first link in the chain of title to Jessup and the St. Louis, Kansas City & Northern Railway Company to the property of the North Missouri Railroad Company. and without which they had no title.

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And especially so, as the said act of 1871 gave an express lien for all taxes on said property till they were paid.

The case of *Heine v. Levee Commissioners*, 19 Wall. 655, has been invoked as an authority opposed to the views above expressed. It will be seen, upon an examination of the case, that it has nothing to do with the case in hand. One point of the case in judgment was whether the plaintiffs, who were owners of certain bonds issued by levee commissioners, had an equitable lien on the real and personal property of said parishes for the payment of said bonds, the levee commissioners who issued them having resigned without levying a tax for their payment. It was held that no such lien existed, and in the disposition of the question Justice Miller expressly declined to decide the question whether taxes lawfully levied are until paid a lien on the property against which they are assessed, and observed in that connection "that it was too clear for argument that taxes not assessed are no liens." Conceding this to be so, it is nevertheless true, according to the decisions of this court and authorities hereinbefore cited, when real property which has been omitted from assessment and taxation for past years is assessed and taxed for such omitted years, that the tax then becomes a lien superior to all others.

The objection made that the act of 1871, *supra*, is retrospective, and, therefore, unconstitutional, I think, is without force. A law which retrospects and looks back becomes obnoxious to the constitutional inhibition against the passage of retrospective laws, only when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a disability in respect to transactions or considerations already past. The said act of 1871, though it looks to the past, does not interfere with any vested right, neither does it create a new obligation nor impose a new duty. It only seeks the performance of a duty theretofore imposed, and the enforcement of an obligation which theretofore rested on the company. Stripping the case of all redundant and

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irrelevant matter, and the sole question presented is: Can the property of a railroad which was liable to assessment and taxation from the years 1862 to 1871 inclusive, which had escaped taxation during that period by reason of its not having been assessed nor taxed upon its value as ascertained by its capital stock, or upon its cash value as other real and personal property, be subjected to the payment of taxes for the omitted years?

For the reasons herein given my opinion is that it can, and that the judgment of the court of appeals reversing that of the circuit court ought to be affirmed.

On Motion for Rehearing.

HENRY, J.—We have carefully examined the cases cited by counsel in their brief on the motion for a rehearing, and shall notice particularly that of the *Pacific R. R. Co. v. Cass Co.*, 53 Mo. 17, which bears a stronger resemblance to the case at bar, than any of the others to which our attention has been called. The distinction between that and this case is palpable. By the act of December 25th, 1852, the property of the Pacific Railroad Company was not only subject to taxation, but a special mode for its assessment was provided, differing from that provided by the general law. Instead of the shares of the capital stock, the property, as contradistinguished from the stock, was alone taxable, and the president of the company was required, on the 1st of February in each year, to furnish to the State Auditor a sworn statement of the actual value of the property of the road, and on that basis the assessment was made. The section of that act providing that after the Pacific and Southwestern Branch should be completed, opened and in operation, and have declared a dividend, the property of the company should be subject to taxation at the actual cash value, at the same rate assessed by the State on other property of like value, was not self-enforcing while the general law remained in force, under

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which the shares of the capital stock of all corporations were taxed for State purposes. Hence, it was followed by a provision which prescribed a different mode of taxing the Pacific Railroad Company from that which applied to corporations generally.

A similar provision in the act amendatory of the North Missouri Railroad charter, declared, that its property should be subject to taxation, as such, but it was not followed, as in the case of the Pacific Railroad Company, with a section prescribing a mode of assessing the property, but the general law, by which the shares of its capital stock were taxed, was left in force. The only effect of the provision was to take the property out of the operation of a previous act, which had declared all the property of that company personal property, and vested it in the holders of the capital stock, in proportion to their respective shares.

The principal question in the *Pacific R. R. Co. v. Cass Co.*, was whether the company was exempt from taxation for county purposes, and the court held it was not; that the property being taxable for State purposes, the counties through which the road ran had a right to levy taxes for county purposes on such of the property as lay within the counties respectively. The county, by express provision of the statute, can levy taxes only on such property as is taxable for State purposes, and it would certainly not be contended that Cass county could have levied taxes upon the shares of the capital stock of the Pacific Railroad Company under the act of 1852. And the position is equally untenable, that St. Charles county, while the general statute remained in force and applicable to the North Missouri Railroad Company, could levy taxes upon the property, as contradistinguished from the shares of the capital stock, of the North Missouri Railroad Company; the State having taxed the shares of its capital stock and not the property. While counties are confined to the same objects of taxation that are taxed by the State, it does not follow that they can levy their taxes in the same manner

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only. While the act of 1852 in relation to the Pacific Railroad Company, provided a mode for levying State taxes on its property which could not be resorted to by the counties through which its road ran, yet they could levy their taxes upon it in the manner provided by the revenue law for the assessment of other real and personal property. So with regard to the North Missouri Railroad Company, each share-holder was liable to be assessed in the county in which he resided on the shares of the stock of that corporation owned by him. We see no reason for receding from or modifying the opinion heretofore delivered in this cause. All concur, except NORTON, J.

HOUGH, C. J.—By the 6th section of the act of January 7th, 1853, amending the charter of the North Missouri Railroad Company, it was declared that all the property of said company should be deemed to be personal estate. The act of March 17th, 1868, changed the artificial character given to the property of said company by its amended charter to its natural and real character. After the passage and acceptance by the company of the act of 1868, the legislature had its election either to tax specifically the lands, lots, depots, etc., and other property of the company, or to tax the capital stock of the company in the hands of the share-holders, as representing such property. The law-making power of the State by failing to amend the revenue law, which provided for taxing the shares of stock of all banks and other corporations, elected to continue the taxation of defendant, the North Missouri Railroad Company, by an assessment of its shares of stock. The act of 1868 was not intended to be, and did not operate as, an amendment of the general revenue law, and the assessor would have had no right under the general revenue law to assess for county purposes any other property than that which was assessable for State purposes, and the property so assessable for State purposes was the stock of the company, and not the lands, depots and other

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property *in specie*. The property of the company, therefore, while subject to taxation *in specie* under the constitution of 1865, and the act of 1868, was not, in fact, subjected to taxation, but the shares of stock as representing such property were subjected to taxation. Under the act of March 10th. 1871, the State and counties had no right to assess back taxes against any property of the company save such as had prior to that time been subjected to taxation and had not been assessed and paid taxes. It was the stock of the North Missouri Railroad Company, only, and not its lands and other property *in specie*, which had been subjected to taxation and had escaped taxation. Persons buying the stock of the North Missouri Railroad Company would have taken it subject to taxation under the act of 1871, but those buying the property itself, did not take it subject to the levy of any back tax against it, *in specie*, under said act; as the property of the company, *in specie*, had never been subjected to taxation. I am, therefore, of opinion that the motion for rehearing should be overruled. SHERWOOD, J., concurs in the view here presented.

FOSTER V. FOSTER, *Appellant*.

Judgment for defendant affirmed for want of evidence to sustain the allegations of the plaintiff's petition.

Appeal from Johnson Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

S. T. White for appellant.

J. J. Cockrell and *O. L. Houts* for respondent.

NORTON, J.—This suit was instituted in the Johnson county circuit court for the assignment of dower, and it is averred in the petition that plaintiff was married to James M. Foster, and that during the coverture and on the 12th day of March, 1861, James Foster was seized to the use of said James M. Foster, his son, of an estate of inheritance in certain lands in the petition described; that said James M. Foster procured a deed to be executed to said James Foster to said lands with the intent to defraud plaintiff of her right of dower in the same. It is also averred that plaintiff was subsequently divorced from said James M. for his fault and misconduct, and that subsequently to said divorce, on the 12th day of October, 1866, the said James M. procured the said James Foster to convey without consideration said land to defendant Agnes J. Eads, who afterwards intermarried with the said James M. and held said land in secret trust for him with full knowledge of plaintiff's right and the fraudulent acts of said James M.; that said James M. died in 1878; and the petition concludes with a prayer that plaintiff be endowed with one-third part of said lands.

The defendant, in her answer, after admitting the marriage of plaintiff with said James M. Foster and her subsequent divorce from him, denies all the other allegations, and sets up that she bought said land in good faith in 1866, prior to her marriage with said James M., and is the real owner thereof, and also that prior to the decree for alimony in plaintiff's divorce suit, it was agreed by and between plaintiff and said James M. Foster, that she would accept a decree for \$2,000 alimony in full of all claim for dower and alimony, but that by mistake said decree was entered up for \$2,000 in full of alimony only. Upon the trial of the cause the court found for defendant and dismissed the bill, and we are asked on plaintiff's appeal to review this finding.

After an examination of the record we are of the opinion

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that the judgment is for the right party. It appears from the evidence in the case that up to 1860 James M. Foster (the then husband of plaintiff) owned the land in question, that during that year he and his wife removed to the state of Texas, and before leaving Missouri sold and conveyed the land to W. S. and A. B. Foster for the consideration of \$5,000, plaintiff joining in the deed and relinquishing her right of dower; that W. S. Foster executed his note for his part of the purchase money, and A. B. Foster paid \$1,300 and gave his note for the remainder; that W. S. and A. B. Foster afterwards, in 1861, became involved, and being satisfied that they could not pay for the land wrote to said James M., then in Texas, informing him of this fact, and requested him to take the land back, which he consented to do; that said W. S. and A. B. Foster conveyed the land to James Foster, he having bought the same, according to the testimony of W. S. Foster, of said James Foster, and that he occupied the land till 1862, and died in 1867. It also appears that plaintiff returned to Missouri from Texas in 1862 or 1863, and instituted suit for divorce against James M. Foster, and obtained a decree for divorce and also for \$2,000 alimony, it appearing from the evidence that the said amount for alimony was the result of a compromise in which the estate of said James M. was estimated at \$6,000. It further appears that in August, 1866, and after said decree of divorce, James M. Foster, in anticipation of and as a marriage settlement gave to defendant, then Agnes J. Eads, the sum of \$3,000, and that in October of said year she bought said land of James Foster for the sum of \$2,000, and received a deed therefor. We have failed to find any evidence in the record sustaining the averment in the petition that this purchase was made by said Agnes Eads, the defendant, without consideration and with full knowledge or any knowledge that said land was held by James Foster for said James M. Foster, or that any of the conveyances of the same were made with a view to defraud plaintiff of dower in the

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same. The failure of proof in this respect gave the trial court full warrant to render the judgment appealed from. While the record shows that plaintiff and her sister testified that James Foster, prior to the sale of the land to said Agnes, had said to them that he held the land for plaintiff and James M. Foster, her husband, there is no evidence that defendant had notice or knowledge of this fact, and it did not so appear on the face of the deed made to said Foster by said W. S. and A. B. Foster. Judgment affirmed, in which all concur.

THE CITY OF JEFFERSON, *Plaintiff in Error*, v. CURRY.

1. **Jefferson City: TAXES, ACTION FOR.** Under the charter of the City of Jefferson, as revised in 1872, (Sess. Acts 1872, p. 393, § 14,) the city may maintain a personal action for taxes against any person in whose name any taxes are assessed, if he was the owner of the property taxed at the time of the assessment.
2. **Practice.** Judgments against one of several defendants are expressly authorized by section 3673, Revised Statutes.

Error to Cole Circuit Court.—HON. GEORGE W. MILLER,
Judge.

REVERSED.

Edwards & Son for plaintiff in error.

Ewing & Hough and *Botsford & Williams* for defendant in error.

WINSLOW, C.—This is an action by the City of Jefferson, a municipal corporation, for corporation taxes, assessed in the name of William A. Curry, against certain lots described in the petition, for several years between 1866 and 1874, of which real estate, it is alleged, the other defend-

ants have since become the owners. The petition was drawn upon the theory that the city had a lien upon the property for these taxes, which it could enforce against it in the hands of subsequent purchasers. In the case of the *City of Jefferson v. Whipple*, 71 Mo. 519, it was held that this lien did not exist, but that the city could maintain a personal action for the taxes. In the case of the *City of Jefferson v. Mock*, 74 Mo. 61, it was held that this action could only be maintained against the owner at the time of the assessment of the taxes, in whose name the property must have been assessed. The petition is one of a printed form adopted and used for these suits, and is, therefore, very full in its allegations, containing sufficient to authorize a personal judgment against such of the defendants as were owners of the property at the time of the assessment and in whose name it was assessed. Defendants demurred to this petition on two grounds. 1st, Because it did not state facts sufficient to constitute a cause of action. 2nd, Because the city had no lien for these taxes. This demurrer was sustained; the plaintiff declined to plead further, and judgment was rendered thereon for the defendants, to reverse which the plaintiff brings the case here by writ of error.

It will be observed that the demurrer raises no question as to the misjoinder of parties, apparent on its face; nor does it raise the question of limitation, as in the *Whipple case*; and the defective description existing in that case is not found in this one. We mention these matters because the brief in the *Whipple case*, on the part of the defendant in error, has been filed as their brief in this one, and contains points not involved here.

Counsel for plaintiff in error now maintain, since the decision in the *Whipple case*, that the petition stated a good cause of action for the taxes, and that the court should have granted such relief as the plaintiff was entitled to on the face of the petition. In *City of Jefferson v. Mock*, *supra*, it is said: "If the taxes had been assessed against

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the defendants, and they at the time they were so assessed owned the lots, and the petition had so alleged, it would have stated a cause of action, although, in the petition, the city claimed a lien for the taxes which did not exist, and sought to enforce it against the lots." This petition does allege that defendant Curry was the owner of the lots, and that the taxes due thereon were assessed against him as such owner. This brings the case within the rule above stated; and as the petitions in these cases are alike in their general allegations, it follows that the court below erred in sustaining the demurrer. The city was undoubtedly entitled to a judgment against Curry for the amount of the taxes, on the admission made by the demurrer. The city charter expressly authorizes personal actions for these corporation taxes. Laws 1872, p. 393, § 14. The demurrer admitted a good cause of action against Curry; and the court in rendering the judgment, should have made it conform to the facts stated and admitted.

Judgments against one of several defendants are expressly authorized by statute. R. S., § 3673.

The judgment should be reversed and the cause remanded. All concur.

MACK V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, Appellant.

1. **Pleading Negligence.** In an action founded upon negligence, it is not necessary for the plaintiff, in his petition, to set out the facts constituting the negligence. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently and carelessly done, will suffice.
2. ———: **PRACTICE.** A general charge that the defendant "negligently killed" plaintiff's horse, if not objected to before trial, will be sufficient to let in proof of any act whatever on the part of the defendant which caused the killing or contributed thereto.

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Appeal from Montgomery Circuit Court.—HON. G. PORTER,
Judge.

AFFIRMED.

Wells H. Blodgett for appellant.

Emil Rosenberger for respondent.

HOUGH, C. J.—This suit was originally instituted before a justice of the peace upon the following statement:

The St. Louis, Kansas City & Northern Railway Co., Dr.

To James Mack.

November 23rd, 1878, to damages for negligently killing at Bear Creek township, Montgomery county, Missouri, one gray mare	\$60 00
Voluntary credit	10 00
Balance due	\$50 00

The plaintiff recovered judgment and the defendant has appealed.

The plaintiff's horse was killed at a crossing, on either side of which ties had been piled, close to the track, to the height of seven or eight feet, for acceptance by the railroad company, or for shipment, which, does not clearly appear, thereby leaving a space in the highway for crossing the track only seven or eight feet wide, and making a narrow lane from the open space left for crossing to the cattle-guard. No witness who testified at the trial saw the horse struck by the cars, but it is fairly inferable from the testimony that it was struck by the engine on or near the crossing, and was forced through the lane formed by the ties, and carried sixty feet inside of the cattle-guard.

The court instructed the jury that if they believed from the evidence that the horse was killed by reason of the negligence of the defendant's servants in managing the train, or if the defendant negligently permitted the cross-

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ing to be obstructed by the ties so as to render the passage of stock over the same more hazardous than it would otherwise have been, and the horse was killed in consequence of said negligence, they would find for the plaintiff. The defendant contends that under the statement filed the plaintiff could only recover for negligence of the defendant in the management of its train, which, though not averred, was implied; that the negligence, if any of the defendant, in permitting the crossing to be obstructed by the ties not having been averred in the complaint, could not be made a ground for recovery; and that as there was no testimony whatever tending to show negligence in the management of the train, the judgment should have been for the defendant.

[We are all of opinion that it is not necessary to set out the facts constituting the negligence complained of; that a general averment of negligence is sufficient, and that an allegation, therefore, specifying the act, the doing of which caused the injury, and averring generally that it was negligently and carelessly done, will suffice. Thompson on Neg., 1246, note 26; *Schneider v. The Mo. Pac. R'y Co.*, 75 Mo. 295; *Edens v. Hann. & St. Jo. R. R. Co.*, 72 Mo. 213.

But my associates go further and hold that inasmuch as the charge in the complaint that the defendant "negligently killed" the plaintiff's horse, was not objected to before the trial, it was sufficient to authorize proof of any act whatever of the defendant's servants which caused such killing or contributed thereto, and that there was consequently no error in admitting testimony as to the piling of ties in the highway near the track. They are further of the opinion that no error was committed in giving the instruction referred to.

The judgment must, therefore, be affirmed.

NOBLE V. BLOUNT, *Appellant*.

1. **The Judgment** below is manifestly right on the undisputed facts as they appear in evidence.
2. **Instructions.** Although some one out of a number of instructions given may be faulty, yet where the conclusion reached by the jury is manifestly right and a different result could not have been reached without injustice, the verdict ought not, on this account, to be disturbed.
3. ———. To determine whether a judgment should be reversed for error in an instruction, it should be read in connection with the other instructions given in the case.
4. ———. A judgment will not be reversed for error in an instruction given by the court of its own motion, when one given at the instance of appellant contains the same error.
5. **Principal and Surety.** A surety cannot recover of his principal if he pays the debt with knowledge of facts which would discharge himself or his principal, or if, to shield himself against liability in another direction, he procures the surrender to himself of the obligation of his principal.
6. **Estoppel.** There can be no defense on the ground of estoppel where the defendant has neither acted nor altered his situation on account of what was said by the other party, nor unless the estoppel was pleaded.
7. **Ratification** must be pleaded.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY,
Judge.

AFFIRMED.

Booher, Heren & Son for appellant.

Strong & Mosman for respondent.

PHILIPS, C.—This is an action by respondent, who was plaintiff below, against the appellant, who was defendant below, to recover for balance due on a promissory note executed to her by appellant. The answer admitted the allegations of the petition. The contention in the case is over the second count of the answer, in which the defend-

ant pleaded, in substance, that after making the note sued on he became surety for plaintiff on a note executed by them to one Samuel Dysart, for \$400. The answer further alleged that defendant derived no benefit from the last named note; that on the 9th day of March, 1876, prior to the commencement of this action, "he was compelled to and did pay off and discharge said note on which he was surety," amounting to the sum of \$648; that plaintiff knew before she sued he had so paid said note. Defendant asked that this sum be allowed him as a credit on the note sued on. To this new matter the plaintiff replied tendering the general issue. The only witnesses examined touching this issue were the plaintiff and defendant; and as the errors complained of and the conclusion arrived at by us can best be appreciated and comprehended by reference to their testimony, a statement of its essential features is necessary.

The defendant testified that he signed the Dysart note solely as surety for plaintiff, and was then ignorant of its consideration; that in January, 1876, as administrator of the estate of one Parrott, he had a settlement with Dysart; that "said estate and I took up said (Dysart) note;" that afterwards he mentioned this fact to plaintiff. At first she denied ever giving such a note, but on inspection admitted her signature to it. She said she was glad defendant had taken it up; it was the only way he would ever get anything out of Dysart. Or as interlined in the bill of exceptions, the plaintiff said, "I am glad of it, or it is a good thing you did it." On cross-examination he denied any knowledge that this note was given for the purpose of preventing any one from administering on Parrott's estate, though he admitted there was some unseemly haste on the part of a certain sister-in-law to administer, and that there was some feeling in the matter. The plaintiff was his sister-in-law; and it was desired that he should administer. He became administrator, and at the sale of the property of the estate he permitted Dysart to purchase

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property without giving any security, although Dysart was insolvent. The probate court having held him responsible for this fund, he took up the Dysart note, made by him and plaintiff, in payment of the amount so paid over by him to said estate. He did not so take up this note at plaintiff's request. Dysart was his son-in-law.

Mrs. Noble testified in substance that she did not owe Dysart a cent. On the contrary he was indebted to her in large sums of money at the time Blount claimed to have taken up the note, and that Blount knew this fact at the time. The Dysart note was without consideration. The only inducement to its execution which she could suggest was that she and Blount being jointly interested in preventing the grant of letters of administration on the Parrott estate to their sister-in-law, it was stated by each of them that they "would rather than \$200 she should not have letters," and they may have given the note to compass her defeat. Dysart was present. During the whole six years Dysart held this note he never mentioned it to her. She held claims against him which she asserted exceeded the note in controversy, and which Blount knew of, for he drew them up. She never requested Blount to pay the Dysart note. She protested to Blount against selling Dysart any property at the administrator's sale without security, as he was worthless.

Blount did not return to the witness-stand in rebuttal of any of this new matter. Nor did he introduce Dysart as a witness.

On this state of the pleadings and evidence, it is difficult to perceive how an intelligent and honest jury could
1. THE JUDGMENT. find other verdict than the one it did, for the plaintiff, on this issue. The form of the verdict indicates that at least the foreman was intelligent and apprehensive. In fact, under the pleadings and proofs had the jury not found this issue for the plaintiff it would have been the plain duty of the trial judge, on application, to have promptly set aside the verdict. On this issue the burden

clearly rested on the defendant to establish the relation of principal and surety. On the face of the note they were both principals *prima facie*. True, it was competent as between themselves to establish by parol the relation the makers sustained to each other. By defendant's failure to contradict plaintiff's testimony as to the presence of Dysart when the note was made, the presumption was that he was so present; and as the law placed the burden on the defendant, why did he not call Dysart, his son-in-law, or account for his absence? Indeed, had it not been for the fact that in law the promissory note itself imported a consideration, when the defendant rested his case, the plaintiff could have successfully demurred to his evidence; for his own evidence disproved the allegation of his answer, that he "was compelled to pay off said note in full." On the contrary, he testified that he took it up solely to protect himself against his improvidence in administering Parrott's estate. He was scheming and speculating in fact to make his widowed sister-in-law re-imburse him for a loss, impending on trusting an impecunious son-in-law with assets of the estate against the protestations of this very widow.

The evil disposition of this party is likewise manifested from his answer, which further weakens the justice of his appeal. He alleges that he paid this Dysart note on the 9th day of March, 1876, and alleged that the principal and interest aggregated then \$643. The note only bore six per cent interest, and on March 9th, 1876, would have amounted to only \$542.66. Nor does it anywhere appear from his evidence how much Dysart owed Parrott's estate, or how much he really allowed or paid to Dysart on the surrender of the note. In fact, his testimony was that "said estate and I took up the said note." How much of it the "estate took up," and how much the defendant, it was impossible for the jury to find. The measure of his recovery from Mrs. Noble would have been the sum actually paid with six per cent interest from the date of payment.

We have been thus full in the presentation of the merits of this case, on the undisputed facts, in order to
2 INSTRUCTIONS. show that even conceding the errors complained of by appellant in the instructions given, the jury were not likely, if indeed they could have been, misled to appellant's injury; for it must alike result from the positive provisions of our practice act, as from that spirit of conservatism in our courts that would not sacrifice the ends of justice upon the sharp edge of technicality, that although some one out of a number of instructions given may be faulty, yet where the conclusion reached by the jury is manifestly right, and a different result could not have been reached by them without injustice, the verdict ought not on this account to be disturbed. R. S., § 3569; *Blewett v. R. R. Co.*, 72 Mo. 583; *Mauerman v. Siemerts*, 71 Mo. 101; *State v. Hopper*, 71 Mo. 425. Of course regard must always be had in such conjunctures to the peculiarities of the case on trial.

The appellant complains most of the following instruction, given by the court of its own motion:

1. "As to the note mentioned in the second paragraph or count of the answer payable to Samuel Dysart, the execution of the note is admitted and it imports a consideration, and the parties making it are bound and held for its payment, unless it be shown by the evidence that the note was given without any consideration, or for an illegal consideration, and is, therefore, void, or not binding on the parties. If the jury believe from the evidence that this note was given without any consideration, or that it was given to Dysart for services rendered, or to be rendered actually or pretendedly, in preventing the appointment of any one as administrator of any estate, or in procuring any one to be appointed administrator of an estate, then such note is illegal and without a valid consideration and void; and if the defendant knew the consideration of the note, or that it was without consideration at the time he signed it, or before he took it up, or if he

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received it on a debt due from Dysart or otherwise after it was past due, you should find for the plaintiff as to that ground of defense, and not allow any credit to defendant on account of said note."

This instruction is inartistic and carelessly phrased. The words, "or if he received it on a debt due from Dysart or otherwise after it was past due," if designed by the court, or if it is apparent that they were calculated to induce the jury to believe they could find a verdict for the plaintiff on that isolated fact, were misleading. But the instruction must be taken in its entirety and construed in its combination. *McKeon v. Citizens R. R. Co.*, 43 Mo. 405; *Moore v. Mo. Pac. R'y Co.*, 73 Mo. 438. It must be read in connection with the fifth instruction given on behalf of defendant, which, for prudential reasons possibly, he has omitted in the presentation of the case in his statement.

At the defendant's request the court gave the following:

5. "If the jury believe from the evidence that plaintiff executed and delivered the note given to Dysart, as principal, and that defendant signed said note as her security, the giving and delivery of said note is *prima facie* evidence that said note was given for a valuable consideration. If the jury further believe from the evidence that after said note became due and payable the defendant took up said note for plaintiff, and after so doing gave the plaintiff notice of such fact, and that plaintiff assented to and acquiesced in defendant's taking up said note and he then notified her of the fact, (if you find such notice,) and she failed to make any dissent or objection to the taking up of said note, the jury will find the said note and interest for defendant, and credit him with the same, unless you shall believe from preponderance of the evidence that said note was given without any valid consideration. Then, and in that case, you should find for

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plaintiff on said note, as mentioned in an instruction in the handwriting of the court, marked one."

So far as the record presented to this court shows, instruction No. five was asked by the defendant. No exception to it was taken. It thus appears that the appellant, himself, had the jury instructed to find the issue for the plaintiff if they found the note was without consideration. As this instruction refers expressly to instruction No. one given by the court, it is manifest that what the court intended in the first instruction to tell the jury, and what the jury doubtless understood by it, was that if they found the fact to be that the note was without consideration, and defendant knew it when he paid it, or paid it after maturity, they should find for defendant. The defendant should not be heard to complain here that this first instruction virtually precluded from the consideration of the jury the rights of defendant as a mere surety, based on the credibility of his evidence, when he himself, in effect, told the jury they could find against him if the note was without consideration, notwithstanding the fact that he was a surety. The language of Napton, J., in *Davis v. Brown*, 67 Mo. 313, is quite pertinent: "Considering all the instructions together, we do not see how the jury could have been misled; and the verdict seems to show that they were not. It hardly lies in the mouth of the defendant to object here to a technical blunder which he waived on the trial by adopting the error." See to same purport *Leabo v. Goode*, 67 Mo. 126.

Had the defendant by his proof brought himself within the circle of protection, which the law throws around a surety, who in good faith discharges the debt of his principal, he would have been entitled to a declaration of law authorizing a recovery against the plaintiff perhaps, even though the note as between principal and payee was subject to a valid defense. Brandt on S. and G., §§ 82, 197. It is also equally clear that a surety who, with knowledge of facts which would discharge him

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SURETY.

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or his principal, yet pays the creditor, cannot recover this sum from his principal. Burge on Suretyship, 365; *Russel v. Faylor*, 1 Ohio St. 330. And if to shield himself against a liability in another direction he procures his debtor to surrender to him the debt of the principal, the courts ought not to aid in an effort thus to counter on his principal. *McCrory v. Parks*, 18 Ohio St. 1.

In respect of the refusal of the court to instruct on the questions of ratification and estoppel, in my judgment, **6. ESTOPPEL.** there was no evidence in the case to justify such declarations of law. No estoppel can arise in such a case, as what was said by Mrs. Noble was after the alleged payment of the Dysart note by Blount. He neither acted on nor altered his situation on account of her utterance. *Spurlock v. Sproule*, 72 Mo. 503. Nor was there any issue tendered in the pleadings to authorize such evidence or instructions. Estoppel *in pais* must be specially pleaded. *Bray v. Marshall*, 75 Mo. 327.

And if he relied on a ratification of an unauthorized act he should have counted on the subsequent promise. **7. RATIFICATION.** *Gwinn v. Simes*, 61 Mo. 339.

This judgment, in my opinion, on the whole record, is just and ought to be affirmed. The other commissioners concurring, the judgment is affirmed accordingly.

CARPENTER V. LIPPITT, *Appellant*.

1. **Dogs.** Under the statute, (R. S. 1879, § 5434,) it is lawful for any person to kill a dog which has killed or maimed a sheep or other domestic animal; it is not necessary that the dog should be upon the premises of the owner of such animal, nor in the act of killing, nor that he should have killed more than one such animal, nor that the owner of the dog should have had notice of the killing.
2. **Depositions.** Under the statute, (R. S. 1879, § 2157,) to authorize the reading of the deposition of a witness residing in the county, it

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is not enough to show that he has gone to a greater distance than forty miles from the place of trial, but it must also be shown that such absence is without the consent, connivance or collusion of the party offering his testimony.

Appeal from Linn Circuit Court.—The case was tried before C. BOARDMAN, Esq., sitting as Special Judge.

REVERSED.

A. W. Mullins for appellant.

H. Lander for respondent.

HENRY, J.—This suit originated in a justice's court, and was for the recovery of double damages for the killing of plaintiff's dog by defendant. From a judgment against him in the justice's court, plaintiff appealed to the circuit court of Linn county, where he obtained a judgment, from which defendant has appealed. At the trial in the circuit court, plaintiff offered evidence of the value of the dog which defendant admitted he killed on his own premises. Defendant then introduced evidence tending to prove that the dog had frequently chased, worried and killed defendant's sheep, on his farm, and that he was killed on defendant's premises. The plaintiff, in rebuttal, introduced evidence tending to prove that his dog had never chased, worried or killed any of defendant's sheep, and had not returned to defendant's premises at the time he was killed, to do any mischief. This was all the evidence offered, except the deposition of one Jno. Burnes, taken and offered by defendant, which the court excluded, which ruling will be hereafter noticed.

For plaintiff the court instructed the jury:

1. That the law recognizes the right of property in dogs; and if the jury find from the evidence that defendant caused the plaintiff's dog to be killed, as complained of, then plaintiff is entitled to recover from defendant the full value of the dog, as shown by the evidence, at the time

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of the killing, unless the jury should further find from the evidence that the dog was at the time of such killing in the act of running, maiming, injuring or killing defendant's sheep or other domestic animals; or that the dog had, prior to the killing, injured, maimed or killed any such domestic animals of defendant, and that plaintiff had notice thereof before such killing.

2. The mere fact that the dog was on defendant's premises at the time of the killing complained of, will not justify defendant in causing the dog to be killed, but to justify such killing the jury must further believe from the evidence that the dog had prior to that time chased, injured, maimed or killed defendant's sheep or other domestic animals, and that plaintiff had notice thereof; or that the dog was, at the time of such killing, in the act of chasing, injuring, maiming or killing such domestic animals of defendant.

3. Unless the jury find from the evidence that the dog, prior to the time defendant caused him to be killed, had chased, injured, maimed or killed the sheep or other domestic animals of defendant and that plaintiff had notice thereof, or that the dog at the time of the killing was in the act of running, injuring, maiming or killing such domestic animals of defendant, the jury are bound to find their verdict for plaintiff in some amount, even though it may not be greater than nominal damages.

The court of its own motion gave the following instruction:

2. If the jury believe from the evidence that at any time before defendant had plaintiff's dog killed, said dog had destroyed some of defendant's sheep or lambs, and that the dog had returned upon defendant's premises apparently for the purpose of destroying other sheep, although at the time the dog was so killed he was not in the very act of destroying or worrying the sheep, then defendant was justified in killing said dog, and the jury should find their verdict for defendant.

The following asked by defendant were refused :

1. If the jury believe from the evidence that plaintiff's dog had killed, maimed or worried defendant's sheep or any of them before said dog was killed by defendant's directions, then defendant had the right to kill or cause said dog to be killed, and the verdict must be for defendant.

2. If the jury believe from the evidence that at any time before defendant had plaintiff's dog killed, said dog had destroyed some or any one of defendant's sheep or lambs, and that the dog had returned upon defendant's premises apparently for the purpose of destroying or worrying other sheep, although at the time the dog was so killed he was not in the very act of destroying or worrying the sheep, then defendant was justified in killing said dog, and the jury should find their verdict for defendant.

4. The jury are instructed that in determining the question as to whether or not plaintiff's dog was of any actual or real value at the time he was killed, they should take into consideration the habits and qualities of the dog in all respects as disclosed by the evidence in the case.

5. If from all the evidence in the case the jury believe that the dog in question was of no actual or real value, then the jury are bound to find their verdict for defendant.

The instructions for plaintiff held defendant responsible, unless at the time the dog was killed he was in the
1. DOGS. act of worrying, maiming, injuring or killing defendant's sheep, or prior to that time had done so, and plaintiff had notice of that fact.

Section 9 of the act entitled "An act to provide for the registering and licensing of dogs," approved April 13th, 1877, (Sess. Acts 1877, p. 326,) provides that "In every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animal may recover against the owner or keeper of such dog or dogs the full

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amount of damages, and the owner shall forthwith kill such dog or dogs; and for every day he shall refuse or neglect to do so, (after notice,) he shall pay and forfeit the sum of \$1; and it shall be lawful for any person to kill such dog or dogs." This is an act of outlawry against sheep-killing dogs, and there is nothing in the section which restricts the right of the owner of sheep killed, to kill the dog when taken in the act of killing the sheep, or when found on the premises of the owner of the sheep. Not only the owner of the sheep killed, but any one, under the statute, may kill the dog which has killed sheep, and this construction of the statute justifies the remark, that it is an act of outlawry against sheep-killing dogs.

All of the instructions for plaintiff were, therefore, erroneous. That given by the court of its own motion, taken in connection with the refusal to give the second asked by defendant, indicates the view of the court to have been, that the right to kill the dog did not arise from the killing of one sheep, but only when more than one were killed. While only the plural number is used in the statute in relation to sheep and other domestic animals, it is not to receive the narrow and literal construction which seems to have been placed upon it by the circuit court. Bishop on Statutory Crimes, § 213; *Hall v. State*, 3 Kelly 18; *Comm. v. Messenger*, 1 Binney (Pa.) 273; *Nichols v. State*, 30 Texas 515. The second instruction asked by defendant should, therefore, have been given without the modification made by the court. The right to kill the dog exists under the statute, whether the owner had notice that he had killed the sheep or not. The provision with regard to notice relates exclusively to the penalty of \$1 for every day that the owner shall neglect or refuse to kill the dog. All of plaintiff's instructions announced the contrary, and were for this additional reason erroneous.

We do not think the court erred in excluding Jno. Burnes' deposition. One of the conditions upon which a

2. DEPOSITIONS. deposition may be read to the jury is, that

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the witness, if he reside in the county, is more than forty miles distant from the place of trial without the consent, connivance or collusion of the parties offering the deposition. The deponent resided in Linn county. This is shown by the testimony of Mrs. Severance, and it was not enough to show his absence, but also that such absence was without the consent, connivance or collusion of the defendant. For the errors in the giving and refusing of instructions the judgment is reversed and the cause remanded. All concur.

THE STATE *ex rel.* ROSS V. CASE *et al.*, Appellants.

1. **Sheriffs: EXECUTION: FALSE RETURN: AMENDMENTS.** Under the statute, (R. S. 1879, § 2401,) an officer to whom an execution is delivered, in case he makes a false return on the writ, is liable for the whole amount of money directed to be levied. *Held*, that where the falsity consisted in stating that the writ was ordered to be returned satisfied by plaintiff's attorneys, an amendment by leave of court striking out the false statement was no defense to an action for the false return.
Corby v. Burns, 36 Mo. 194, distinguished on the ground that in that case the amendment was in conformity with the facts.
2. ——— : ——— : ——— : **INSOLVENCY.** A plea of insolvency of defendant in the execution, is no defense to an action against a sheriff and his sureties upon his official bond for making a false return.
3. ——— : ——— : **FAILURE TO RETURN: DAMAGES.** Where no damages are proven, a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law.

Appeal from Monroe Circuit Court —HON. JOHN T. REDD,
Judge.

REVERSED.

Wm. J. Howell for appellants.

The words in the return alleged to be false are imma-

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terial. Even fraud without damage gives no right of action. No property was levied on or lien lost. Amendments in furtherance of justice are favored and relate back to the original return or matter amended. The court making the amendment had jurisdiction and the necessary parties before it, and if the words objected to in the return had any force, the amendment removed the obnoxious part. *Webster v. Blount*, 39 Mo. 500; *Corby v. Burns*, 36 Mo. 194; *Scruggs v. Scruggs*, 46 Mo. 271; *Magrew v. Foster*, 54 Mo. 258; *Kane v. McCown*, 55 Mo. 181; *Phillips v. Evans*, 64 Mo. 17; *Dunham v. Wilfong*, 69 Mo. 355. There were no damages proved on the third breach, and the verdict and judgment should have been for defendants. 1 Wag. Stat., 614, § 64; *Stephenson v. Judy*, 49 Mo. 227.

James Carr for respondent.

Falsehood is the mischief which the statute guards against. R. S. 1855, p. 750, § 65; *Tomlinson v. Long*, 8 Jones L. 469; *Albright v. Tapscott*, 8 Jones L. 473; *Lemit v. Freeman*, 7 Ired. 317; *Houser v. Hampton*, 7 Ired. 333; *Peebles v. Newsom*, 74 N. C. 473; *Andrew v. Parker*, 6 Blackf. 461. The return is conclusive between the parties to the case. Its truth can only be contradicted in a suit against the sheriff for a false return. *Macdonald v. Leewright*, 31 Mo. 29; *Hallowell v. Page*, 24 Mo. 590; *Stewart v. Stringer*, 41 Mo. 400; *O'Connor v. Wilson*, 57 Ill. 226. An amendment is not allowable after an action for a false return has been commenced against the sheriff, and it is too late after twelve years of litigation. *Stewart v. Stringer*, 45 Mo. 113; s. c., 41 Mo. 400. The sheriff's return is conclusive against him. He has no right to contradict, vary, change or amend it after suit brought against him for a false return. *Boone County v. Lowry*, 9 Mo. 23; *Gardner v. Hosmer*, 6 Mass. 325; *Purrington v. Loring*, 7 Mass. 388; *Butler v. State, etc.*, 20 Ind. 169; *Simmons v. Bradford*, 15 Mass. 82; *Weld v. Bartlett*, 10 Mass. 470; *Sheldon v. Payne*, 7 N. Y. 453; s. c., 10

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N. Y. 398; *Flick v. Troxsell*, 7 Watts & S. 65. The damages for failure to return an execution in proper time are *prima facie* the amount specified in the execution. *Ledyard v. Jones*, 7 N. Y. 550; *Bowman v. Cornell*, 39 Barb. 69; *Patterson v. Westervelt*, 17 Wend. 543; *Bank v. Curtiss*, 1 Hill 275; *Pardee v. Robertson*, 6 Hill 550; *Kellogg v. Manro* 9 John. 300.

HOUGH, C. J.—On the 30th day of October, 1858, the relator recovered a special and general judgment against Beverly Frields and C. C. Woodson for \$1,567.70 debt, \$155.34 damages and \$12.80 costs, to be first levied of certain land having a mill thereon, and if the same should not satisfy said judgment, then to be levied of any other goods, chattels, lands and tenements of said Frields and Woodson. Execution issued in pursuance of said judgment, returnable April 27th, 1859. Upon this execution the following return was made: "I executed the within by levying upon one steam saw mill February 23rd, 1859, and by exposing the same for sale on the 12th day of April, after giving ten days notice of time, terms and place of sale, and Alexander Crawford being the last and highest bidder for the same, it was stricken off and sold to said Crawford for the sum of \$70. This execution is, therefore, entitled to a credit of \$70. This execution ordered returned not satisfied by attorneys T. L. Anderson and Southworth, for plaintiff, May 23rd, 1859, and by summoning as garnishees Beverly Frields, W. W. Wise, J. J. West, Robt. Jenkins, Andrew Jenkins (and others named), on this 21st day of March, 1859."

The present action was instituted in 1861 against the sheriff and his sureties on his official bond for an alleged failure of said sheriff to execute said writ according to the terms, and the following breaches were assigned: 1st, That the sheriff failed to sell the tract of land described in said execution, according to the command thereof, and levied on and sold a steam saw mill for \$70, which was in-

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dorsed on the execution as a credit, and summoned sundry persons as garnishees. 2nd, That so much of the return as states that the execution was ordered to be returned not satisfied, by attorneys T. L. Anderson and Southworth, was false. 3rd, That the sheriff failed to return said execution according to the command thereof.

The answer to the first breach alleges that the relator ordered the sheriff not to sell said tract of land, but to sell only the mill thereon. There was a finding and judgment for the defendants on this breach, and it need not be further noticed.

An amended answer to the second breach filed in 1875 admitted the making of the false return, and alleged that the same was made through mistake and misapprehension of a conversation had with said attorneys, and averred that on the 6th day of June, 1873, the circuit court of Audrain county, on motion of said sheriff—the said Ross appearing thereto—by its order granted leave to said sheriff to amend said return by omitting in the same the words, “This execution ordered returned not satisfied by attorneys T. L. Anderson and Southworth, for plaintiff, May 23rd, 1859,” and that said sheriff appeared and in said court amended said return by omitting in the same said words, and that said court thereupon amended said return, and ordered and adjudged that said original return be and the same is reformed and amended as and in conformity with the amended return, which is to stand for said original return; all of which the trial court, on motion of plaintiff, struck out as constituting no defense.

The answer also averred that, when said original return was indorsed on the execution, the same was wholly unsatisfied except said \$70, and that said Frields and Woodson were insolvent and had no other property to levy on; to which portion of the answer a demurrer was sustained.

The answer to the third breach denied that the execution was not returned according to the command; averred

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that the sheriff had all the money that was made on the execution before the court on the return day, and paid it to plaintiff; denied that said tract of land was worth \$2,000, as alleged in said breach, and any damages to relator, and averred that said Ross afterward sued out another execution on said judgment and had said land sold for the sum of \$61.

The instructions of the court as to the second and third breaches, are as follows:

2. The pleadings show that the return on the execution was false, in so far as it states that the execution was returned unsatisfied by the order of Anderson and Southworth, attorneys for the plaintiff in the execution, and the falsehood of said return will sustain an action against the sheriff and his securities on his official bond, and such false return was a breach of the condition of the bond.

3. The measure of the damages sustained by the breach of the condition of the bond by reason of the false return, is fixed by statute at the amount of the debt then due on the execution, less all payments before or afterward made thereon.

4. The measure of the damages arising out of the third breach assigned in the petition, should that breach be found for the plaintiff, is nominal only, plaintiff having failed to prove any actual damage arising out of said breach.

Numerous instructions were asked by the defendants and refused by the court, of which it will only be necessary to notice the second and seventh, which are as follows:

2. If the court find from the evidence that the relator, Ross, ordered the sheriff to not sell or excused him from selling the real estate described in the petition, and ordered or directed him to sell a steam saw mill standing on the same separate and apart from said land, and that in pursuance thereof said sheriff did so sell said steam saw mill for the sum of \$70, and returned the said sale on said execution, and that it is not shown in evidence that the said

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Fields and Woodson, while said execution was in the hands of said sheriff, and when he made said return on said execution, and when said return was indorsed on said execution, had any other property subject to execution, and the same was unsatisfied except the \$70, and no other property levied on, the words: "This execution ordered returned not satisfied by attorneys T. L. Anderson and Southworth for plaintiff," will not authorize a verdict for the relator, although in point of fact the court may believe that the said Anderson or Southworth, or either of them, did not order said sheriff to return said execution not satisfied.

7. If the court should find the issue on the second breach assigned for the plaintiff, it should only assess such damages as it may believe from the evidence that the relator, Ross, has sustained by said breach.

The amendment made in 1873 of the sheriff's return constituted no defense to the second breach alleged by plaintiff, and the plea thereof was properly stricken out by the court. The amendment

1. SHERIFFS: exe-
cution: false re-
turn: amend-
ments.

made was itself a confession that the return made in 1859 was a false return, but it could not relieve the sheriff and his sureties from the liability incurred by them by reason of such false return. This case is not like that of *Corby v. Burns*, 36 Mo. 194, relied upon by the defendants. In that case a constable was sued for failing to return an execution in time, and after suit brought he was allowed to amend his return in accordance with the facts, so as to show that the execution had in fact been returned at the time prescribed by law, and he thereby defeated the action of the plaintiff. There the officer had in fact performed his duty, but the return first made failed to show the fact. Here the violation of duty complained of consisted in making the false return, and no amendment of the return could make that true which was false when made, or could absolve the sheriff from liability for having made a false return. The right of action of the relator

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arises out of the false statement by the officer of facts, which if true, would have exempted him from liability for having failed to collect the sum due on the execution then in his hands, and this right of action cannot be taken away by an amendment expunging such false statement, after the injury, which the law presumes, has been inflicted.

The demurrer of the plaintiff to that portion of the answer setting up the insolvency of the execution defendant, was properly sustained. Such a plea is no bar to an action for false return. *Stevens v. Beckes*, 3 Blackf. 88; R. S. 1879, § 2401. The statute cited declares that any officer who shall make a false return of any execution which shall be delivered to him "shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied," regardless of the real extent of the injury occasioned by such false return. The penalty imposed by the statute cited was by the statutes of 1835 imposed upon the officer for failing to make return of an execution according to law, and while this provision was characterized by this court, in the case of *Milburn v. State*, 11 Mo. 188, as an exceedingly harsh one, inflicting in many instances a penalty greatly disproportioned to the delinquency of the officer, it was nevertheless enforced. Since the revision of 1845, however, the liability of the officer for failing to return an execution has been limited to the damages actually sustained in consequence of such default. But the penalty of making full payment of the amount of the execution still remains for making a false return. It follows, that the court committed no error in giving the second and third instructions for the plaintiff, and in refusing the second and seventh asked by the defendants.

The court erred, however, in giving the fourth instruction for plaintiff and in rendering judgment in his favor on the third breach. Although the sheriff may have failed to return the execution at the

3. ———: ———: on the third breach. Although the sheriff may failure to return: damages.

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time fixed by law, yet no damages were proved, and under the decision of this court in *Stevenson v. Judy*, 49 Mo. 227, the relator was not even entitled to nominal damages. The judgment will be reversed and the cause remanded with directions to the circuit court to enter up judgment for the relator on the second breach, and for defendants on the other breaches. All concur.

TERRY V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK: PLEADING.** In an action under the 43rd section of the Railroad Law, (R. S., § 809,) it is not essential that the complaint shall allege that the failure to fence occasioned the injury.

A complaint alleged that the animal, without any fault on the part of plaintiff, strayed upon defendant's track, and that it was struck and killed at a point where the railroad passed along, through and adjoining enclosed and cultivated fields, and that at that point defendant had failed to build and maintain lawful fences to prevent said animal from straying on its track. *Held*, sufficient.

2. ———: ———. In such an action if the complaint is sufficient and the facts warrant a judgment for the plaintiff, the judgment will not be set aside because the instructions do not require the jury to find that the injury was occasioned by the company's failure to fence.

Appeal from Pettis Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

Thos. J. Portis for appellant.

Geo. P. B. Jackson for respondent.

WINSLOW, C.—This is an action under the 43rd section of the corporation act, now Revised Statutes, section 809,

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for killing stock, commenced before a justice of the peace, and appealed to the circuit court, where the plaintiff recovered judgment, to reverse which, the defendant brings the case here by appeal. The sufficiency of the complaint and the propriety of a single instruction given for plaintiff, are the only errors now insisted upon. The constitutionality of the statute is discussed, but that question has been determined since the appeal. The material part of the complaint is as follows: "That on the 15th day of said month, or about that time, the defendant was operating its engines and cars on its said road, which extended through La Monte township, Pettis county, Missouri, and while so operating the said road at said time, wrongfully ran over and upon and killed a certain three-year-old red beef steer, to the plaintiff belonging, which, without any fault on the part of plaintiff, strayed upon defendant's track. The said animal was struck and killed by defendant in said township at a point where said road passed along, through and adjoining inclosed and cultivated fields, and not a public or private road-crossing, or where the road passed through any town or city; that at said point defendant had failed to build and maintain lawful fences to prevent the said animal from straying upon its track. The value of said animal was and is \$50."

The objection to this complaint is, that it does not allege that the failure to fence occasioned the injury. It

L. RAILROADS: is alleged that the animal, "without any fault
killing stock:
pleading. on the part of plaintiff, strayed upon defendant's track;" that it was struck and killed "at a point where said road passed along, through and adjoining inclosed and cultivated fields," etc., and that "at said point defendant had failed to build and maintain lawful fences, to prevent said animal from straying on its track." There is also an allegation of negligent killing. It may be inferred from these allegations, especially the one last quoted, that the animal strayed upon the track and was killed, at a point where the road was not fenced as required by law,

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by reason of failure to fence. This is sufficient. *Edwards v. R. R. Co.*, 74 Mo. 117; *Williams v. R. R. Co.*, 74 Mo. 453; *Scott v. R. R. Co.*, 75 Mo. 136; *Bowen v. R. R. Co.*, 75 Mo. 426; *Belcher v. R. R. Co.*, 75 Mo. 515; *Kronski v. R. R. Co.*, *post*, p. 363. This complaint is quite as full as those sustained in the foregoing cases.

The trial was before the court without a jury, both parties appearing. The record recites that, on the trial, 2 —: —. "the plaintiff's evidence tended to prove all the averments in the petition," but no evidence was preserved. The court gave this instruction for the plaintiff: "That if the court believes from the evidence that, on or about the 15th day of May, 1878, the defendant, by its agents, engines or cars, killed the steer of plaintiff on defendant's railroad, in La Monte township, Pettis county, Missouri, at a point on said railroad where the same runs through or along inclosed or cultivated fields, and not at a public or private road-crossing, or where said railroad passed through any town or city; and that at such point the defendant had failed and neglected to erect and maintain lawful fences on the sides of said railroad, then the finding will be for the plaintiff, and assess his damages at the cash value of the steer at the time it was killed." The objection to this instruction is the same as that urged against the complaint. It has been held, in two recent cases, that the complaint being sufficient, and the facts warranting the recovery, giving a similar instruction was not a reversible error. *Moore v. R. R. Co.*, 73 Mo. 438; *Williams v. R. R. Co.*, 74 Mo. 453.

The judgment should be affirmed. All concur.

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TAYLOR v. NEWMAN, *Appellant*.

1. **Bill of Exceptions.** This court will not disregard a bill of exceptions as having been filed after the term, unless that fact appears affirmatively by the record.
2. **Inland Bill of Exchange: CONSIDERATION: PLEADING.** An instrument in this form: "Building committee will pay G. W. T. the sum of \$126.25 and charge to (signed) N. and L.," is an inland bill of exchange, and as such, under the law merchant, imports a consideration without the words "value received." In declaring upon such an instrument no consideration need be alleged.
3. **Bill of Exchange: ACCEPTANCE: PLEADING.** In an action against the drawer of a bill of exchange payable on demand, the petition alleged a conditional acceptance the effect of which was to postpone payment, but failed to allege that the drawer had had timely notice of the nature of the acceptance and had consented to it, or that the drawee had not kept the terms of his acceptance, or to make averments showing that as between the drawer and drawee the former had no right to draw the bill. The reply, however, did allege that after non-payment of the bill the drawer, with knowledge of the acceptance and non-payment, agreed to pay. *Held*, that for want of some one of the averments so omitted from the petition it should have been held bad on demurrer to the evidence; *Held* also, that the defect was not cured by the reply.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

REVERSED.

Chas. A. Winslow for appellant.

T. B. Kimbrough for respondent.

MARTIN, C.—This action was commenced in the Randolph county circuit court June 14th, 1876, on the following order:

Building Committee, Methodist Church, will pay G. W. Taylor the sum of \$126.25, and charge to

NEWMAN & LESSLEY.

September 9th, 1872.

The petition alleges that the order was delivered to

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plaintiff and by him presented to John B. Taylor, one of the building committee, who wrote upon the back of it the following acceptance:

Accepted, provided the committee owe the amount on settlement; if not, then as far as they owe.

JOHN B. TAYLOR, for Committee.

September 9th, 1872.

That afterward, on a blank date, said John B. Taylor had a settlement with Newman & Lessley, and thereafter wrote this indorsement on said order: "There is nothing coming to Newman & Lessley from said building committee. John B. Taylor, for committee." That the order was given with the knowledge that a settlement must take place between Newman & Lessley and the Building Committee before anything could be paid on same; that after said settlement plaintiff gave Newman & Lessley notice that said order had not been paid, and demanded payment thereof from them. Judgment is asked for the amount of the order with ten per cent interest from its date.

Defendant, in his answer, admits the execution of the order, alleging that, at the time it was given, the Methodist church owed Newman & Lessley the amount thereof, denies that said firm ever had any final settlement with the Building Committee, and alleges that plaintiff agreed to accept said order upon said committee in full payment for the amount therein contained then owing by defendant individually, and by Newman & Lessley as a partnership, upon open account to the plaintiff, and to use all due and proper and necessary diligence in the collection of the same from said committee. It is then alleged, that plaintiff failed to use any diligence in the collection of said order, and failed and neglected to take any proceedings for the collection of same, that he extended the time of payment without the consent of defendant, and that he failed to notify defendant of the failure to pay same until the commencement of this suit. It is denied that the order was ever duly presented as charged.

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Plaintiff, in his replication, traverses the allegations of the answer specifically; and alleges that, upon being notified of the non-payment of said order by said committee defendant did thereupon agree and promise to pay plaintiff the full amount on said order, and defendant then and there agreed that plaintiff should hold said order as a demand against him for the amount of money therein named.

The issues were tried by jury at the March term, 1878, of said circuit court, and resulted in a verdict for plaintiff in the sum of \$195.37. At the trial the plaintiff read in evidence the order and indorsement as stated in the petition, the execution of which was admitted by defendant. The plaintiff next testified to the circumstances under which the order was taken; and said that he told defendant that the committee on whom it was drawn claimed they did not owe Newman & Lessley anything, but that he would take the order and credit the account with anything received on it; that defendant said he owed it and would pay it if the committee did not; that the indorsement of September 9th was made on it, when presented, on the day it was drawn; that the order was presented the second time to the committee, who declared they did not owe and would not pay anything on it, and thereupon made the second indorsement on it to that effect; that defendant was not present and did not at the time know of the second indorsement; that plaintiff then notified defendant of the refusal of the committee to pay, and defendant said he would pay every cent of the order; that he did not know of any settlement between Newman & Lessley and the committee, and did not know that anything was due them, that the order was taken under the belief it would not be paid, which was communicated to defendant, and that plaintiff told defendant at the time he would do no more than present it; that he was not to institute proceedings upon it, but only to present it for payment.

Before the plaintiff concluded his own testimony the defendant objected to the introduction of any evidence at

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call, on the ground that the petition did not state facts sufficient to constitute a cause of action, which objection was overruled.

The defendant was produced in behalf of himself. The court refused to permit him to testify that the building committee was indebted to Newman & Lessley, or that there had or had not been a settlement. He was allowed to testify that he did not know of the refusal of the committee to pay until April, 1873; that the plaintiff was never authorized by defendant to take a conditional acceptance, and that defendant did not know of such acceptance until long after. Defendant offered to prove that the indebtedness of the committee to Newman & Lessley was for work and labor done on a church, for which, at the date of the order, they had a mechanic's lien, which was lost by taking the conditional acceptance and extending the time. This evidence was excluded. Defendant testified that he did not remember telling plaintiff he would pay every dollar of the order, or that he would pay it when he got money from Tennessee. Another witness was produced, who offered by receipts, papers and statements to prove that the building committee was indebted to Newman & Lessley at the date of the order, but was not permitted to so testify. This concluded the evidence.

The following instructions were given for plaintiff:

1. The jury are instructed that the execution of the order by defendant and Lessley is admitted by defendant.
2. Although the order is given in the firm name of Newman & Lessley, yet plaintiff may recover against defendant.
3. If the jury believe from the evidence that Taylor presented the order to the building committee, or two of them, within a reasonable time after the execution, and they refused to accept it unconditionally, and he informed Newman of the fact and Newman agreed to pay it, they will find for plaintiff.

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The court refused the following instructions asked by defend

1. The jury are instructed that, under the testimony in this case, plaintiff cannot recover.

2. The jury will find for the defendant, unless they believe from the evidence that there was a settlement between the building committee and Newman & Lessley, or that Newman waived the necessity of a settlement, and agreed to pay the order, after failure to pay by the committee, notwithstanding there had been no settlement.

3. The building committee is, under said order, personally liable to the plaintiff for the payment of said order, and unless the jury believe from the evidence that the same was duly presented by plaintiff to said committee for acceptance, and payment of same was refused by said committee, and said order protested for non-payment, and notice of said protest given to defendant, the jury will find for defendant, unless they further believe from the evidence that defendant waived the necessity of notice of non-payment.

4. The jury are instructed that plaintiff cannot recover under the pleadings in the case, on the testimony offered.

5. If the jury believe from the evidence in this cause that defendant gave the order in question, the law presumes that he had funds in the hands of the drawee sufficient to meet its payment, and if the payee received a conditional acceptance on said order, without the consent of defendant, postponing the payment of said order until a settlement was made between defendant and said building committee, then plaintiff cannot recover until he shows said settlement to have been made and nothing due defendant.

6. It devolves upon plaintiff to prove said settlement, and that there is nothing due defendant, before he can recover in this cause.

The first point urged by respondent's counsel for affirmance of the judgment is, that the bill of exceptions

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1. BILL OF EXCEPTIONS. appearing on the record was filed at a period of time subsequent to the term at which the trial took place, and while this was done by leave of court, the record fails to disclose that it was done with the consent of the parties. When a bill of exceptions is filed after the term at which the case was tried or motion for new trial disposed of, two conditions are necessary, according to the decisions of the Supreme Court, to make it a part of the record; there must be a consent or stipulation of the parties, and an order of court to the same effect. *McCarty v. Cunningham*, 75 Mo. 279. I may add what is probably implied in the foregoing condition, viz: that the bill must also be filed within the time limited by the stipulation and order. In this case the defendant obtained leave of the court to file his bill of exceptions by the 26th of March, 1878. This order of the court was made on the 11th of March, 1878. The record recites that "afterward, on the 23rd day of March, 1878, the defendant filed in the clerk's office of said court his bill of exceptions." The certificate of the clerk to the transcript of the record refers to the bill in the transcript as a full, true and complete "copy of the bill of exceptions on file in said court in the cause therein named." There is nothing in the record to sustain the assumption that the 23rd or the 26th of March, 1878, was after the lapse of the term. There is nothing to show that the term had been adjourned and that the bill was filed in vacation. Under this state of facts the present bill will have to be accepted as part of the record. *Pershing v. Canfield*, 70 Mo. 140; *Weil v. Jones*, 70 Mo. 560.

In passing upon the errors complained of by appellant, I will consider the action of the court in refusing to sustain his objections to the admission of any testimony for the reason that the petition did not state facts sufficient to constitute a cause of action. It will be seen from the petition that the plaintiff has brought his suit, not upon the debt supposed

2. INLAND BILL OF EXCHANGE: consideration: pleading.

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to have been due to him from Newman & Lessley, but upon the instrument of writing delivered to him by them, which is described in the petition. This cause of action must be controlled by the law governing such instruments. The principal objection now urged to the sufficiency of the petition relates to the failure of the instrument to recite a consideration and to the failure of the petition to set out any consideration for it.

Of course, under our statute a promissory note must contain the words "value received" to be a negotiable instrument. Wag. Stat., 216, § 15; R. S. 1879, § 547; *Bailey v. Smock*, 61 Mo. 213; *International Bank v. German Bank*, 3 Mo. App. 362. But another provision of our statute expressly declares that any instrument in writing wherein the maker promises to pay any sum of money or property therein mentioned to another, or to his order, or to bearer, shall import a consideration, and be payable as therein specified. 1 Wag. Stat., 270, § 6; R. S. 1879, § 663; *Lindell v. Rokes*, 60 Mo. 249. If the instrument sued on was a promise of the defendant to pay money or property, although a non-negotiable instrument, the petition would not be defective by reason of the failure to set out a consideration. The instrument, however, is not a promissory note either negotiable or non-negotiable; neither is it a check on a bank, or an order transferring any particular fund. It has all the essential elements of a draft or inland bill. 1 Edwards Bills and Notes, § 1; *Ford v. Angelrodt*, 37 Mo. 50. It is an absolute order on the drawee to pay the plaintiff \$126.25, and charge the same to the drawers. It is not necessary that a bill of exchange, either foreign or inland, should recite that it is for "value received." Being an order for the payment of money to another it imports, under the law merchant, a consideration, without such recital. 1 Edwards Bills and Notes, (3 Ed.) § 202; *Jeffries v. Hager*, 18 Mo. 272; *Kinsman v. Birdsell*, 2 E. D. Smith 395; *Coursin v. Ledlie*, 31 Pa. St. 506. See *Ford v. Angelrodt*, 37 Mo. 50. To obtain the statutory

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damages of four and ten per cent, it is necessary that bills of exchange in this State should recite that they are for "value received." R. S. 1879, § 540; *Phillips v. Evans*, 64 Mo. 17; *Löwenstein v. Knopf*, 2 Mo. App. 159. When such damages are not wanted, the bill is in all other respects a negotiable instrument, and imports a consideration without the words "value received." 1 Edwards Bills and Notes, (3 Ed.) 202. I am satisfied it was not necessary in suing on this instrument to allege a consideration. The objection to the petition on this account is not well taken.

But the insufficiency of the petition in another respect becomes apparent, when we come to consider more closely the commercial character of the instrument
3. BILL OF EX-
CHANGE: accept-
ance: pleading. sued on. It implies that Newman & Lessley either had \$126.25 in the hands of the building committee of the church, subject to their order, or that by reason of the promise of the committee or course of dealings or condition of accounts between them, Newman & Lessley had reasonable expectation to believe that their order for that amount would be honored when presented. This legal import of the written instrument, I do not think could be changed by evidence of conversations between the parties at the time it was delivered, certainly not in a case in which a waiver of presentment is not pleaded. On receiving the order, the plaintiff undertook to present it for payment and notify the drawers of its dishonor. Of course no protest was necessary. As the order was payable on presentment it was not necessary to present it for acceptance. There was nothing objectionable, however, in presenting it for acceptance. If presented for acceptance and accepted unconditionally, it was payable at once, for such was its tenor and effect. If Newman & Lessley had, as between themselves and the building committee, any right to draw it at all, they had the right to require the holder to present it within a reasonable time, and notify them of dishonor. If he had presented it and it had been refused, the drawers would be liable upon simple notice of the re-

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fusal of payment. The petition does not allege that it was presented for payment and notice of non-payment given to the drawers. It alleges that when presented to the committee, the committee, instead of paying it, or accepting it unconditionally, accepted it "provided the committee owe the amount on settlement; if not, then so far as they owe." It is not alleged that this acceptance was with the consent of Newman & Lessley. If they had any right to draw such an order, as between themselves and the committee, this conditional acceptance without their consent would discharge them under the law merchant. 1 Edwards Bills and Notes, (3 Ed.) § 536. It was a departure from the terms of the order; it extended the time of payment and qualified the amount to be paid.

If they had no right, as between themselves and the committee, to draw such a draft or order, then the failure to present or give notice of non-payment would be no defense against the plaintiff in an action on the instrument with proper averments of these facts. Neither, in that case, would the conditional acceptance of the drawee be a defense. If the drawers had reasonable expectation that their order would be accepted or paid, the holder was bound to due diligence in respect to presentment and notice of dishonor. Having in such a case consented to and taken a conditional acceptance, instead of an absolute one, it was, at least, incumbent on him, in enforcing his rights against the drawers, who became collateral or secondary obligors, after the acceptance, to show that the acceptors had not kept the terms of their acceptance. 1 Edwards Bills and Notes, § 596; *Ford v. Angelrodt*, 37 Mo. 50; *Campbell v. Pettingill*, 7 Me. 126; *Robinson v. Ams*, 20 John. 146. This he has failed to allege in his petition. The acceptance has two conditions controlling the liability of the acceptors; one is a settlement between the drawers and the drawees, the other is the fact of indebtedness or no indebtedness between them. He has alleged that there was a settlement. But he has not alleged that there was nothing due or owing

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by the committee to Newman & Lessley. It is alleged that the committee wrote upon the order the statement that there was nothing coming to Newman & Lessley. What the committee say or wrote about their obligation is immaterial. It is incompetent evidence as against the drawers. Their statement that there is no indebtedness cannot take the place of the fact that there was nothing due or owing according to the terms of their acceptance. Accordingly it must be held that the objection to the introduction of evidence for insufficiency of the petition ought to have been sustained.

This insufficiency could not be cured or helped by an allegation in the replication that after non-payment of the order the defendant, with the knowledge of the acceptance and non-payment, agreed to pay the order. If this allegation had been in the petition, it would have cured the defect, either as a new promise, or as a waiver of all objection to the character of the acceptance and want of diligence in making it available.

This infirmity of the petition was perpetuated in the trial. The plaintiff closed his case after testifying himself as to both conditions of the acceptance, showing that neither of them had happened, expressly declaring that he did not know of any settlement and did not know whether or not anything was due and owing to Newman & Lessley. When the defendant's evidence was offered, all testimony about the conditions was excluded. The defendant was not permitted to show that a settlement had been made, or that anything was due and owing from the committee.

The instruction of defendant to the effect that plaintiff could not recover on the testimony, ought to have been given. The first and second instructions for plaintiff were correct.

The third was erroneous. There was nothing in the petition to sustain the new promise; neither was there any allegation of a waiver of diligence in respect to pursuing

The State v. Curtis.

the terms and conditions of the acceptance; neither is there any evidence in the case that after the order was presented to the committee, the defendant was notified of their refusal to accept unconditionally, before their conditional acceptance was written upon the paper. If the defendant with a knowledge that it had been conditionally accepted agreed to pay it unconditionally, this promise, when properly pleaded, would constitute a new contract, or would sustain a waiver of further diligence in pursuing the acceptors. If his agreement was conditional, the conditions of it would have to be complied with to make it available as a new ground of recovery.

The judgment is reversed and the cause remanded for re-trial. PHILIPS, C., concurs; WINSLOW, C., not sitting, having been of counsel in the case when the same was submitted to the court.

SHERWOOD, J., did not concur in approving the foregoing opinion.

THE STATE V. CURTIS, *Appellant*.

Practice, Criminal: NEWLY DISCOVERED EVIDENCE. A judgment of conviction will be reversed where the trial court refuses to grant a new trial asked on the ground of newly discovered evidence which is relevant and important, and which could not have been discovered until after the trial.

Appeal from Adair Circuit Court.—HON. ANDREW ELLISON,
Judge.

REVERSED.

F. M. Harrington and Willis Oldham for appellant.

D. H. McIntyre, Attorney General, for the State

HENRY, J.—At the February term, 1881, of the Adair circuit court, the defendant was indicted for a rape alleged to have been committed by him upon one Olvi Vanlandingham, and at the same term was tried, convicted and sentenced to twenty years' imprisonment in the penitentiary. He has appealed to this court from the judgment. He was convicted on the testimony of Olvi Vanlandingham corroborated by that of Dan'l Fosselman, but not as to the main fact. She made no outcry, although the crime was committed in a populous part of the town of Kirksville, and she swore that she did not, because the defendant and his accomplices threatened to shoot her if she did. Complaint is made that the court admitted testimony on the part of the State which should have been excluded, and in behalf of the State gave erroneous instructions to the jury.

Without repeating here the disgusting details of the evidence, we are satisfied that no error occurred in the progress of the trial, either with respect to instructions given or evidence admitted. After the verdict was rendered, the defendant filed the affidavit of Geo. W. Parks, who was marshal of the town of Kirksville, to the effect, that the day after the alleged rape, he had the prosecuting witness in his custody, and had a conversation with her in which she told him that they did not abuse her that night. This conversation occurred before any complaint of a rape was made against defendant. In his affidavit, defendant stated that he discovered this evidence after his trial; that Parks had kept said communication secret until after defendant's trial, and for a considerable portion of the time after defendant's arrest was out of the county. On these affidavits he asked the court to set aside the verdict and grant him a new trial, which was refused.

We are of the opinion that the new trial should have been granted. The prosecuting witness made no outcry, or offered such resistance as should be made by a female

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upon whom a rape is attempted. She fully explains why she did not at the time of the commission of the alleged rape, but the same night after it was committed, and after she was freed from the restraint of defendant and his accomplices, and for weeks after, she had ample opportunity to make complaint of her ravishment, but did not. This occurred, if at all, about the last of December, and yet for the first time, in the following February, defendant is, by indictment, charged with the crime. We do not say that the evidence before the court did not warrant the conviction, but a very different conclusion might have been reached by the jury if they had had Parks' testimony before them. It was relevant and important, discovered after the trial, and defendant swore, and is not contradicted on that point, that he could not have discovered it earlier, for reasons therein stated, alluded to heretofore.

We think that justice will be subserved by reversing the judgment and remanding the cause, which is accordingly done. All concur.

SMITH V. SIMS *et al.*, *Appellants.*

1. **Probate Judgment: COLLATERAL ATTACK: WANT OF CONSIDERATION.** An order of the probate court allowing a note against the estate of a decedent cannot be assailed in a direct action on the ground that there was no consideration for the note. This is purely a matter of defense, and not the subject of affirmative relief.
2. ———: ———: **FRAUD.** Such an order may be vacated in a direct action for fraud; but it must be fraud in procuring the allowance. The mere procurement of an illegal allowance by representing the claim to be a valid one, is not sufficient.
3. ———: **PLEADING.** A petition in an action grounded upon fraud must state the facts constituting the fraud. A mere allegation that the acts complained of were fraudulently done, is not sufficient.
4. **Probate Allowance: ACTION TO VACATE AND RECOVER PAYMENTS.** After the executors of an estate had paid part of a claim allowed

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against the estate to the original claimant and another part to an assignee of the allowance, an action was brought by a judgment creditor of the estate to vacate the allowance and compel the refunding of the money paid. Both the original claimant and the assignee were made parties defendant. *Held*, that there was no error in this, as they had a joint interest in maintaining the integrity of the allowance; but *Held* also, that a joint judgment against both for the aggregate amount paid was error; the judgment should be limited to a recovery against each for the amount received by him; *Held* also, that the plaintiff could recover only so much as was due upon his judgment, and it there was a balance in the hands of the defendants it was not clear on what principle the court could order it paid into court.

Appeal from Audrain Circuit Court. — HON. G. PORTER,
Judge.

REVERSED.

Ira Hall for appellants.

McIntyre & Brown for respondent.

WINSLOW, C.—This action was originally commenced against appellants individually, and M. V. Ford and James Ridgway as executors of Z. J. Ridgway, deceased. An amended petition was filed in substance as follows: That on March 12th, 1875, Z. J. Ridgway, a resident of Audrain county, died testate, naming the defendants Ford and Ridgway as executors of his will, which was duly probated and letters issued to the executors named therein, who qualified and are still acting thereunder; that January 1st, 1874, the testator executed his promissory note to the defendant James E. Sims, for \$729, value received, payable one day after date, with interest at ten per cent; that Sims was the brother-in-law of testator; that July 13th, 1875, Sims presented the note for allowance against the estate, and it was allowed for \$845.47, and classed in the fifth class of demands; that in March, 1876, the executors paid Sims \$198.48 on this demand; that there were allowed against

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said estate demands to the amount of \$22,000; that the executors have applied to the payment of demands all the estate in their hands subject to such payment, and that the assets are insufficient to pay all the demands in full by about thirty-nine per cent; that said note was without consideration and a gift; that at its execution the testator was insolvent, and all the debts allowed were then outstanding; that said note was allowed by the false and fraudulent representations of Sims to the effect that it was given for a valuable consideration and a valid debt; that after the payment to Sims above stated, he transferred the evidence of said allowance and judgment to defendant Carson, who knew that the same was fraudulent and without consideration as aforesaid; that in 1877, the executors paid Carson \$350 on said allowance; that plaintiff is a creditor of the estate to the amount of \$1,108, allowed May 10th, 1876, and that the sum of \$432.12, with interest, remains unpaid for want of assets. The relief asked is, that the note be declared void and the allowance thereof be set aside, and that Sims and Carson, or either of them, pay into court for the use and benefit of plaintiff, to the satisfaction of his claim, the sum paid to them, and the balance for the benefit of other creditors.

The executors demurred to this petition on the grounds that it did not state facts sufficient to constitute a cause of action, and that they were improperly joined as parties. Sims and Carson filed separate demurrers, in substance alike, stating as grounds, that the petition did not state a cause of action, that Carson and Sims were improperly joined with the executors, that Carson and Sims were improperly joined as defendants, that individual causes of action against Carson and Sims were improperly joined, and that no joint liability against Carson and Sims was shown by the petition. On the hearing of the demurrers the plaintiff entered a non-suit as to the executors, the demurrers were overruled as to the other defendants, who declined to plead further, and a judgment was entered in

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favor of plaintiff against Sims and Carson for \$460.20, the amount of his claim; and these defendants were ordered to pay into court \$116.28, being the balance of the amount paid to them on their demand by the executors after paying plaintiff, to be disposed of by the order of the court for the benefit of the other creditors of the estate.

The petition shows on its face that the note of the testator to the defendant Sims was duly allowed in the probate court of Audrain county, and all the facts necessary to give that court jurisdiction are stated. The allowance of a demand by a probate court of this State is a judgment of a court of record, and declared by statute to have all "the force and effect of a judgment." R. S., § 192. By the same section these courts are given jurisdiction over "all offsets and other defenses allowed by law;" and by section 194 the executor or administrator is empowered to present any offset or make any defense that the testator or intestate might have made in his lifetime. The complaint against the note in question is, that it was executed voluntarily and without consideration, and that its allowance operated as a fraud upon the creditors of the estate. This, if true, would have been a good defense against the allowance of the note; but it was purely a matter of defense, not the subject of affirmative relief; and, hence, whether interposed in the probate court or not, it was barred by the judgment of allowance, and can only be re-opened or affected by such matters as would affect the judgment itself. *Greenabaum v. Elliott*, 60 Mo. 25. The statute already cited committed the jurisdiction over these matters to the probate court; and an appeal from its judgment to the circuit court was authorized. R. S., § 292. Or the allowance could have been vacated and a new trial obtained upon the proper application. R. S., § 216. None of these steps were taken to review the allowance, but it was allowed to ripen into a judgment, which could only be assailed upon some recognized ground of equitable interposition.

1. PROBATE JUDG-
MENT: collateral
attack: want of
consideration.

The plaintiff's entire case rests, primarily, upon the want of consideration for that note, and this matter has
 2. ———: ———: been adjudicated by a judgment which is
 fraud. conclusive upon him at law. It must be apparent that he can make no progress until he removes that judgment and puts himself in a position to re-open the matter apparently concluded by it; and the controlling question in the case is, has he made such a showing in his petition as will entitle him to relief against the judgment? The only allegation in the petition affecting the judgment is, "That said note was allowed against the said estate by the false and fraudulent representations of the defendant Sims, to the effect that said note was for a valuable consideration, and represented a valid debt." In other words, he procured the allowance of a demand against the estate, based upon a note which purported on its face all that he is charged with representing, but against which a good defense existed. Whether this defense was made, or why it was not made, is not stated; nor is it charged that there was any collusion with the executors, or any imposition upon the court in procuring the allowance. All of these matters are left to conjecture.

"The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action be vitiated by fraud, this is a defense which must be interposed, and unless its interposition be prevented by fraud, it cannot be asserted against the judgment." Freeman on Judg., (3 Ed.) § 489. It will not be necessary to consider the question whether the defense against the allowance of this note was prevented by fraud or mistake, because an examination of the cases will show that the petition does not contain any pertinent allegations on the subject. No reason is assigned why the defense was not made; nor does it appear but what it was made and defeated for want of evidence. *George v. Tutt*, 36 Mo. 141; *Reed v. Hansard*, 37 Mo. 199; *Ritter v. Dem. Press Co.*, 68 Mo. 458; *Carolus v. Koch*, 72 Mo. 645. While
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the allowances and judgments of probate courts may be set aside when fraudulently or collusively obtained, the procurement of a merely illegal allowance will not be sufficient to obtain such relief, but some fraud and collusion in procuring it must be alleged and shown. *Mayberry v. McClurg*, 51 Mo. 256; *Stewart v. Caldwell*, 54 Mo. 536; *Sheetz v. Kirtley*, 62 Mo. 417, and cases cited; *Miller v. Major*, 67 Mo. 247.

X The most that can be said of the allegation in this case is, that it charges the procurement of a merely illegal allowance, without showing the fraudulent circumstances under which it was allowed. The allowance was procured by representing the note to represent a consideration and a valid debt, but how any one was injured or misled by this representation, or how the interposition of the proper defense was prevented thereby, does not appear. No fraudulent concealment is alleged; and, if it may be inferred from the allegation made, there is no accompanying allegation that the proper diligence was exercised in discovering and making the defense. *Riddle v. Baker*, 13 Cal. 295. The general allegation that the allowance was procured by the fraudulent representation that the note was valid is not sufficient; it is but a conclusion of law, and the petition would be just as good by omitting the words false and fraudulent, leaving it to read that he procured the allowance by representing the note to be valid. *McGindley v. Newton*, 75 Mo. 115. "To charge fraud, it is not enough to say that the party fraudulently procured, or fraudulently did this or that, or committed a fraud. They are but conclusions of law; the facts constituting the fraud must be stated." Bliss Code Plead., § 211.

X We conclude, therefore, that the alleged want of consideration for the note was a matter of defense which merged in the judgment of allowance, that all the facts stated tending to show fraud relate to the original cause of action, not the procurement of the allowance, and there

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are no allegations to show that the interposition of the defense was prevented by fraud, and that the general allegation that the allowance was procured by fraudulent representations is not sufficient. For these reasons alone the demurrer should have been sustained.

It is, also, maintained that the petition improperly joins the defendants Sims and Carson as parties defendant, and that causes of action against them individually are improperly united. The petition, when properly constructed, may show good reasons for setting aside the judgment of allowance, and, in that event, we are not prepared to say that they may not properly be joined. The object of the action is to set aside the judgment, of which Sims is the assignor and Carson the present owner, and they have a joint interest in maintaining its integrity. Whatever affects the judgment as to one affects it as to the other. While one might not be a necessary party to a suit against the other, it cannot be said that he would not be a proper party under the statute, which declares that "any person may be a defendant who has or claims an interest in the controversy adverse to plaintiff." R. S., § 3465. The statute authorizes a judgment "for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves." R. S., § 3673. The prayer of the petition for a judgment against them individually and jointly for the entire amount paid them by the executors on the allowance, without reference to the amount received by each, is clearly erroneous, but the prayer for relief does not affect the sufficiency of the petition.

The judgment on the demurrers was rendered against Carson and Sims jointly for the entire amount of plaintiff's claim, without reference to the amount each received from the executors on the allowance, and they were ordered to pay into court the balance of the entire sum received by either from the estate. The petition states that \$198.48

4. PROBATE ALLOW-
ANCE: action to
vacate and recover
payments.

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was paid Sims in March, 1876, while he owned the allowance, and \$350 to Carson in 1877, after it had been transferred to him. This was erroneous. Manifestly, they can only be held responsible individually for the amount received by each. On what principle can Carson be held liable for the amount received by Sims, when he is only chargeable at all as the assignee of the judgment with notice, and there is no allegation that he participated in any of the alleged frauds?

Neither is the principle clear upon which the balance was ordered paid into court, since it has been the uniform ruling in this court that neither the administrator nor the other creditors are necessary parties to these actions, and none of them are now parties to this action. What is to be done with this fund? Must the case remain open until all the creditors come in and receive their share? At what period of time, if the other creditors do not intervene, will the defendants be entitled to reclaim their money? for it evidently belongs to them as against all other parties.

The petition is framed upon the theory that the execution of the note by the testator to Sims, voluntarily and without consideration, its presentation for allowance by Sims and procuring its allowance on the representation that it was executed for a valuable consideration, and its payment out of the assets of the estate, operated as a fraudulent disposition of so much of the testator's property, so as to bring the case within the rule permitting a single creditor to maintain a bill to set aside a fraudulent conveyance and obtain priority in the payment of his claim. We have not considered this question, because its proper solution may depend on facts not stated in the present petition, and on the facts stated, as has already been shown, the plaintiff cannot recover.

The judgment should be reversed and the cause remanded, with directions to sustain the demurrers and permit plaintiff to amend his petition. All concur.

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HENRY, *Appellant*, v. WOODS.

Judgment, AS RES ADJUDICATA. A stranger to a judgment cannot avail himself thereof by a plea of *res adjudicata*, nor as evidence upon the trial, in a suit between him and one of the parties thereto. Compare *St. Louis Mut. L. Ins. Co. v. Cravens*, 69 Mo. 72.

CASE ADJUDGED. In an action to recover various sums as for money loaned by plaintiff to defendant, the answer alleged the loan of a larger amount by defendant to plaintiff, and that the moneys claimed by plaintiff were in fact payments by him upon the loan, leaving a balance still due and unpaid to the defendant, and that such had been found to be the fact in a suit brought by a third party against the plaintiff and his wife to compel plaintiff to pay such loan, for which the third party had become liable by note to defendant at plaintiff's request and upon his agreement to pay the same, and that in this suit it had been adjudged that plaintiff should pay to defendant such unpaid balance. *Held*, that defendant, being a stranger to the proceedings in which said judgment was given, could not use it either as a bar or as evidence upon the trial in such action.

Appeal from Johnson Circuit Court.—HON. NOAH M. GIVAN,
Judge.

REVERSED.

Smith & Shirk for appellant.*J. P. Orr* and *John J. Cockrell* for respondent.

PHILIPS, C.—This is an action of *assumpsit* instituted by appellant to recover various sums of money alleged to have been loaned and advanced by him to defendant in 1873 and 1874.

The answer, after interposing a general denial, pleaded that in 1871 defendant loaned plaintiff \$1,500, and plaintiff had defendant to take as and for the same one note of plaintiff's brother, L. H. Henry, for \$1,000, secured by deed of trust on real estate, in which W. C. Marlett was trustee, and one note of \$500 secured by chattel mortgage, but it was plaintiff's debt and he promised to pay it; that

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plaintiff made several payments on said debt and had paid all of said \$500 note, and part of the other, and in February, 1874, plaintiff and defendant had a settlement and there was then due \$962 on said \$1,000 note; that the money claimed in the petition is in fact the money so paid by plaintiff on said debt; that plaintiff, failing to pay said balance, said L. H. Henry, on May 27th, 1875, brought suit in equity in Johnson county circuit court against plaintiff and his wife, to compel plaintiff specifically to perform his said contract and pay said note, and on trial of said cause at November term, 1877, got judgment, adjudging that plaintiff should pay said debt; that in the trial of that cause the several claims set out in the petition in this case were litigated and allowed as payments on said notes, and there was still found to be due \$1,250, which plaintiff was ordered to pay by the term when this answer was filed, June, 1877; and said judgment is still in full force.

The reply denies all new matter in the answer; also says the alleged suit of L. H. Henry against plaintiff and wife was not between parties or privies to this suit, and that the matters here in suit, were not and could not be determined in that suit, and the judgment in that action does not conclude plaintiff in this case and is no evidence of any fact herein; and prays judgment as in his petition.

On the trial by the court without a jury, plaintiff's evidence tended to show that he loaned defendant the money sued for and he refused to pay it. Defendant's evidence tended to show that plaintiff obtained a loan of \$1,500 of defendant, and got his brother to give the notes of \$1,000 and \$500 for it, and the money sued for was paid by plaintiff on that debt. Defendant put in evidence, against plaintiff's objections, the said two notes and mortgages securing the same. In support of the plea of former recovery he introduced the pleadings and record in the suit of L. H. Henry against John A. Henry and wife; petition filed in 1875. On the issues made up in that case

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the court found for L. H. Henry. To the admission of this record in evidence, appellant objected and excepted.

The petition in the case between the two Henrys stated that L. H. executed his note and mortgage to D. Woods for \$1,000, and had dealings with J. Henry, and that in April, 1874, they had a settlement, finding that L. H. owed J. H. \$1,500; they then owned in common certain lands in which L. H. sold his interest to J. H. and conveyed same to J. H. and wife; in consideration of which J. H. cancelled the \$1,500 and agreed to pay the \$1,000 note to Woods; which last named note he failed and refused to pay. The prayer of this petition was for specific performance and to have a lien for said \$1,000 declared on the half interest in said land so conveyed to J. Henry's wife.

The answer, in terms, was a general denial to this petition. It then alleged that from 1863 to April, 1874, L. H. was largely indebted to J. H. for money loaned and paid at his request, and set out the items "none of which (so the abstract of the record states) had any reference to the matters involved in this suit." There was, however, this item: "April 15th, 1871, by cash paid from D. Woods \$1,500." The balance claimed by J. H. in his said account was \$6,182. The answer in said action of L. H. against J. H. and wife, alleged that L. H. was insolvent, and his wife paid \$2,000 of said debt; that L. H. then proposed that if J. H.'s wife would pay back said \$2,000 and J. H. would cancel his claim against him, he would convey to J. H.'s wife his interest in said land so held by them in common, which offer it was alleged they accepted, and paid back said \$2,000, and cancelled said debt, and received the deed conveying said interest to Mary A. Henry. The reply was a general denial in effect.

The judgment in that case finds that J. H. obtained \$1,500 of Woods, and got plaintiff, L. H., to give his note and deed of trust for \$1,000 of it, J. H. agreeing to pay it; that plaintiff traded the land covered by deed of trust to one Levi Hyer for other land, taken in the joint name

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of plaintiff and defendant, and defendant agreed to pay the note and discharge the deed of trust; that subsequently, on 1st of March, 1874, plaintiff and defendant had a full settlement, and plaintiff sold defendant, and conveyed to defendant's wife, his one-half of the land, and defendant again agreed to pay that note and deed of trust. "And the court doth further find, that defendant, J. H., had from time to time paid and discharged of the principal and interest and reduced said note, and that there remained due and unpaid thereof at the date of that settlement, \$962, which amount, with interest thereon, is yet due and unpaid, amounting to \$1,250." The judgment is for \$1,250 to be levied of the goods, etc., of J. H., and if not enough, then of the land conveyed to Mary W., wife of J. H.

Appellant and respondent introduced parol evidence. the one tending to prove, the other to disprove, the identity of the \$1,500 and other items in the two cases.

The court gave an instruction declaring that if the matters involved in the case of L. H. Henry against J. A. Henry and wife were the same as those involved in the present action, the plaintiff could not recover, and, refusing to consider any other question, found in its judgment that the matters in this action were *res judicata* and dismissed plaintiff's action. The controlling question, therefore, presented by the record is: Did the adjudication between L. H. Henry and J. A. Henry and wife preclude the latter from maintaining this action against Woods, who was a stranger to that adjudication?

The fundamental rule on this subject is, that a matter once adjudicated, by a court of competent jurisdiction, may be invoked as an estoppel in any collateral suit, in any court of law or equity, or in admiralty, when the same parties or their privies, or one of the parties and the privy or privies of the other allege anything contradictory to it. And those who assume a right to control or actively participate in the trial or its management, though not formal parties, will be concluded. *Stoddard v. Thompson*, 31 Iowa

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80; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; *Wood v. Ensel*, 63 Mo. 193. The action, however, must be between the same parties as those in the former suit, or their privies. Parties are "all persons having a right to control the proceedings, to make defense, to adduce or examine witnesses, and to appeal from the decision, if an appeal lies." 1 Greenleaf Ev., § 535. Privies are those who have mutual or successive relationship to the same right of property or subject matter, such as "personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the facts." Greenleaf Ev., § 189; Story Eq., § 165.; *Haley v. Bagley*, 37 Mo. 364.

Manifestly the parties to the two suits in question are not the same. Woods was a stranger to the first. As to him it was clearly *res inter alios acta*. He certainly had no right to control the proceeding, or to intermeddle in it, or appeal from any decision that might have been made in it. What privity is there between him and L. H. Henry? He is not a privy in law nor in blood. Is he a privy in estate? What mutual or successive relationship to the rights of property involved in that contention have devolved upon him? No one is a privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit. Freeman Judg., § 162. Whatever rights or interests he had acquired or relation he sustained to the subject matter of that litigation, accrued and were fixed prior thereto. There is no pretense of any newly acquired right by contract, purchase, descent or other succession since that litigation.

Is it sufficient alone that Jno. A. Henry, the plaintiff here, and defendant there, is a party to both suits? *Res inter alios acta, alios nec prodest nec nocet*. A transaction between other parties neither benefits nor injures those not interested. No person, say the courts and the text-books, "can bind another by any adjudication, who was not himself exposed to the peril of being bound in a like manner,

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had the judgment resulted the other way." Freeman Judg., § 154. In *Redmond v. Coffin*, 2 Dev. Eq. (N. C.) 443, Ruffin, J., says: "A decree in favor of one party cannot protect another who was not a party, unless he be a privy. And a stranger thus introduced cannot use the decree at all as such, because it cannot be used against him." Estoppels must be mutual. Suppose that in the equity suit of L. H. Henry against J. A. Henry and wife, the bill had, on hearing, been dismissed because the chancellor found the issues for the defendants, could J. A. Henry in this suit against Woods, a stranger to that litigation, plead it as an estoppel on Woods? Clearly not. Then if that decree could not be used against him by J. A. Henry, he cannot use it against Henry. If he can, what becomes of the doctrine of mutuality in estoppels? *Hempstead v. Easton*, 33 Mo. 142; *Simpson v. Jones*, 2 Snead 30.

In *McCrary v. Parks*, 18 Ohio St. 148, the court holds that although the plaintiff and defendant were co-defendants in the suit invoked as an estoppel, that did not conclude them. "These parties," say the court, "were not adversary parties in that case, nor were their respective rights against each other in controversy." In *Butterick v. Holden*, 8 Cush. 233, it was held that where H. contracted to sell land to A., and afterward in wrong of A. conveyed it to B., that although A. had sued H. and B. in equity for specific performance and failed, yet this judgment was no bar to an action in favor of A. against H. for a breach of his contract. In the equity suit the whole subject matter of the contract, the consideration and breach thereof were gone into and examined, and the court dismissed the bill. Shaw, C. J., said it was a suit between others. "A judgment for the defendant in that suit does not tend to negative defendants' breach of contract, on which this action at law is brought." This doctrine is tersely expressed in some of the older cases in an axiomatic form: "Nobody can take benefit by a verdict that had not been prejudiced by it had it gone contrary." Freeman on Judg., § 159.

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The case of *State to use of Hempstead v. Coste*, 36 Mo. 437, relied on by respondent, does not sustain his position. It is no support for the ruling of the circuit court in this case. The plaintiff there first sued the administrator of the estate, and judgment was entered in favor of the administrator. The plaintiff thereupon sued the sureties on the administration bond "for what this (Supreme) court has heretofore determined the administrator was not liable." The cause of action was identical in the two cases. The court held the judgment in the suit against the administrator a bar to the action against his sureties. The ruling was correct. It is well settled that a judgment against an administrator binds his sureties; and the rule must apply conversely. But on what principle do these decisions rest? It is on the fact that such persons are in privity, privies in estate, with a succession of right and a devolution of responsibility, like that of trustee and *cestui que trust*, master and servant, principal and surety. Freeman on Judg., §§ 174, 179, 181.

It is not unimportant too to observe that the suit invoked as an estoppel was not only by a plaintiff not a party to the present, but was one against J. A. Henry and wife, the latter not being a party to the pending action. The ultimate object of the action of L. Henry was to reach lands held independently by her, and to enforce a vendor's lien thereon; which the decree in that case did direct.

The circuit court erred in holding that the judgment in the case of Henry against Henry and wife created an estoppel in the present suit. The judgment is, therefore, reversed and the cause is remanded with directions to the circuit court to proceed with the case conformably to this opinion. The other commissioners concur.

Well v. Posten.

WEIL, Appellant, v. POSTEN, Garnishee of Beckett.

1. **Practice: PLEADING: EVIDENCE.** A party will not be permitted on the trial to give evidence contradicting his pleadings; nor can he state one ground of defense and recover on a different one.
2. **Evidence: PRACTICE IN SUPREME COURT.** If illegal testimony be admitted, the effect of which cannot be determined, the judgment must be reversed and the cause remanded for a new trial.
3. **Garnishment: PLEADING.** A garnishee in his answer to interrogatories, must state facts and not conclusions of law.
4. **—: CONTINGENT LIABILITY OF GARNISHEE.** Where the answer of the garnishee shows that there is a contingency in which he may have funds of the debtor in his hands, it is error to discharge him before the contingency has been determined.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY, Judge.

REVERSED.

Caldwell, Strong & Mosman for appellant.

Wm. Heren for respondent.

WINSLOW, C.—Appellant obtained a judgment against R. T. Beckett for \$151.10 with interest at six per cent, in the Andrew circuit court August 10th, 1873. Pending the action, which was by attachment, and on December 14th, 1874, the respondent was summoned as garnishee, and July 13th 1873, filed the following answers to interrogatories:

"At the time I was summoned as garnishee of said Robt. T. Beckett in this cause, I had not in my hands, nor have I since had any goods, chattels, property, effects or credits of the said Beckett in my possession or under my control, except as hereinafter stated." That said Beckett did, prior to my being summoned as garnishee, sell, assign and transfer to me a draft or check drawn on the Globe Insurance Company in Chicago, Illinois, for \$1,500, for the

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purpose of paying me an indebtedness of \$400 with interest thereon, which the said Beckett was then owing me, and was then shortly due and payable to me; and for the purpose also of securing me in liabilities that I had incurred as security for said Beckett, a part of which security debts were then due and had been paid. (Here follows a detailed statement of the debts.) Wherefore from the promises aforesaid, garnishee says that, at the time he was summoned as garnishee of said Beckett, the said Beckett was owing and justly indebted to said garnishee in the several amounts as specified, together with the interest thereon amounting to \$1,180; that said garnishee accepted and received said draft or check from said Beckett, in good faith, for the payment of the indebtedness aforesaid to garnishee, and for the payment of said security debts as above stated, which garnishee was bound to liquidate and pay, and has so done as aforesaid. Garnishee states that at the time of the assignment of said draft or check to him by said Beckett, Beckett was wholly and entirely insolvent and unable to pay any of his debts, and still is insolvent. Garnishee states that prior to the service of this garnishment, in this cause, garnishee did, for a valuable consideration, sell, assign and deliver the said draft or check to F. A. Vanhusen. Garnishee says that before the said draft or check was paid, as this garnishee is informed and believes, the attorney for plaintiff in this cause, W. W. Caldwell, notified the said insurance company not to pay the said draft or check, for the reason, as he alleged, that the policy of insurance had been stolen and the draft or check wrongfully or fraudulent obtained, all of which this garnishee believes was false and fraudulent. Garnishee states that in consequence of such notice, as garnishee is informed and believes, the said company did and has refused to pay said draft or check, or any part thereof, and that the same remains unpaid. Garnishee states that his said assignee of said draft or check, F. A. Vanhusen, has brought suit on said draft or check against said company, and if he should collect the

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same, there will be some balance in the hands of this garnishee, over and above what will pay and discharge his liabilities aforesaid—what amount this garnishee cannot answer, not knowing the costs and expenses of collecting the same, and of this litigation; and if the assignee should fail to collect such draft or check from said company, then there will be nothing coming from garnishee, as the garnishee will be liable to said Vanhusen, on his assignment of said draft or check, and will have nothing in his hands or under his control belonging to or coming to the said Beckett. That when served, he was not indebted in any sum due or to become due, only as set out in the foregoing answer."

To this answer the appellant filed the following denial: "Plaintiffs admit that garnishee sold and transferred the draft for \$1,500, for value, to Vanhusen as alleged in the garnishee's answer, and deny each and every other allegation in said answer stated, and pray for judgment for their debt."

The case was tried by the court. On the trial the garnishee offered to testify, when appellants objected, and prayed judgment on the pleadings for their debt, because the answer admitted that the garnishee had sufficient money in his hands belonging to Beckett to satisfy the debt, but the objection was overruled, and the garnishee permitted to testify as follows: "That he has never received any sum whatever on account of the draft or check mentioned in his answer, from said Vanhusen, the assignee, nor from any one, and that said check has not been collected." It was admitted that the appellants had a valid unpaid judgment against Beckett. This was all the evidence. Appellants thereupon filed a written motion for a judgment in their favor, upon the pleadings, evidence and admissions of the garnishee; which motion the court overruled, and rendered judgment discharging the garnishee; and this judgment the appellants have brought before this court for review on appeal.

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Counsel for the respondent seems to rely upon the testimony of the garnishee, above quoted, to sustain the judgment. This testimony, if it means that the garnishee did not receive any money or value for the check or draft from Vanhusen, is a contradiction of the answer, which states that prior to the service of the garnishment, the "garnishee did, for a valuable consideration, sell, assign and deliver the said draft or check to F. A. Vanhusen." A party will not be permitted, on the trial, to give evidence contradicting his pleadings. *Bruce v. Sims*, 34 Mo. 246; *Seibert v. Allen*, 61 Mo. 482; *Capital Bank v. Armstrong*, 62 Mo. 59.

Besides the answer admits the receipt of the value of the check or draft from Vanhusen, and seeks to avoid payment of the conceded balance of \$320, over and above the debts for which the garnishee was liable, on the ground that the check or draft was in litigation between Vanhusen and the insurance company, and, in the event of the defeat of the former, the garnishee might be liable to him for the purchase money, as the assignor or indorser of the check or draft. The evidence in question seeks relief on the ground, as we understand the case, that the garnishee has never received any money from Vanhusen on the check or draft, and has, therefore, nothing in his hands belonging to Beckett to pay on appellants' debt. These are widely different grounds of defense. A party cannot state one cause of action or defense and recover on a different one; he must stand upon the case made by the pleadings. *Chapman v. Callahan*, 66 Mo. 299; *State ex rel. v. Creus-bauer*, 68 Mo. 254; *Donnan v. Intelligencer, etc., Co.*, 70 Mo. 168; *Buffington v. R. R. Co.*, 64 Mo. 246; *Waldhier v. R. R. Co.*, 71 Mo. 514; *Edens v. R. R. Co.*, 72 Mo. 212; *Price v. R. R. Co.*, 72 Mo. 414; *Bullene v. Smith*, 73 Mo. 151; *Ely v. R. R. Co.*, ante, p. 34.

True, the garnishee testified in addition that "the check has not been collected," and, if this alone would justify the judgment, under the pleadings, we are not able

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to say on what ground the court decided the case. Illegal testimony was admitted, the effect of which cannot be determined, and for this reason, we think, the judgment should be reversed and the cause remanded.

As the case must go back for a new trial, it may be well to notice briefly the remaining point in the case. The answer admits the receipt of the check or draft from the judgment debtor for \$1,500, to be applied on debts amounting to \$1,180, leaving \$320 in the hands of the garnishee, if he received the money on the check or draft, which is more than the amount of appellants' judgment. It also admits the assignment of the check or draft to Vanhusen, "for a valuable consideration," which would naturally mean the face of the paper, and the garnishee, therefore, had in his hands money of the judgment debtor, arising from this transaction, more than sufficient to pay appellants' judgment. The only reason assigned why this money should not be applied on appellants' debt is, that the draft or check is in litigation between Vanhusen and the insurance company, "and if the assignee should fail to collect such draft or check from said company, then there will be nothing coming from garnishee, as this garnishee will be liable to said Vanhusen on his assignment of said draft or check." It will be observed that the answer does not state any facts tending to fix the liability of the garnishee to Vanhusen as the indorser or assignor of the check or draft. It is spoken of as a check or draft; the character of the transaction is not shown, whether by delivery alone, writing the name on the back or by an assignment in full, either with or without recourse; nor does it appear that Vanhusen has taken the necessary steps to hold the garnishee liable on the paper. For all that appears in the answer, the garnishee may escape payment in this proceeding, on the ground that he is liable over to Vanhusen, and defeat the claim of the latter, on the ground that he is not liable on the transfer of the check or draft. All that is stated on this subject amounts to no more than

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a conclusion of law. The answer should have stated the facts upon which the liability of the garnishee to Vanhusen was based, so that the court might determine the matter as one of law.

Moreover, the litigation was still pending, the fact was not ascertained on which the garnishee would become liable to Vanhusen, and it was error to discharge him absolutely on that plea. The answer admits that in a certain contingency not then determined, the garnishee would have the money in his hands to pay appellants' debt. Then why discharge him absolutely?

All concur in this report.

SAUER V. BRINKER, *Appellant*.

Parol evidence: ITS ADMISSIBILITY. In an action for money paid to the use of defendant, it appeared that plaintiff had been obliged to pay a note made by one B. and indorsed by plaintiff at B.'s request. Defendant's name did not appear upon the note; but parol evidence was admitted to show that in obtaining plaintiff's indorsement B. was acting as defendant's agent. *Held*, that there was no error in admitting this evidence.

Appeal from Franklin Circuit Court.—HON. A. J. SEAY,
Judge.

AFFIRMED.

Crews & Booth for appellant.

John R. Martin for respondent.

MARTIN, C.—In this action the plaintiff sued for the recovery of \$105.87 paid to the use of defendant.

It is alleged in the petition that one Henry Bertelsman was the agent of defendant and had sole charge of a
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furniture and undertaking business, carried on by defendant in the town of Washington; that said Bertelsman executed his promissory note of the 12th of October, 1875, for the sum of \$175, payable in forty-five days from date, to his own order; that said Bertelsman indorsed the same, and after procuring the indorsement of one Hanneken, presented the same for indorsement to plaintiff, and as agent of defendant represented that he desired to procure the indorsement of plaintiff on the note, to the end that the same might be negotiated at bank for the purposes of defendant's business carried on as aforesaid; that upon the faith of said representations, and upon the credit of defendant, the plaintiff indorsed said note; that the same was negotiated for the purposes of defendant's business; that these acts of said Bertelsman, as his agent, were ratified by defendant; that when said note became due and payable, it was dishonored and protested for non-payment; that the holder of it instituted suit thereon against the plaintiff and the other indorser, and recovered judgment against both; and that the plaintiff was compelled to pay the sum sued for, as his share of the liability.

The answer contains a specific denial of all the allegations of the petition. It then goes on to admit that some time prior to October, 1875, the defendant verbally authorized said Bertelsman to sell and close out a remnant of stock of furniture belonging to defendant, and for that purpose permitted him to use defendant's name to purchase certain articles to fill up and close the business without loss, but with the express understanding that he should not be required to pay for additions made to said stock, and that the same should be paid for by the said Bertelsman himself; and that this arrangement constituted the only arrangement he ever had with Bertelsman in connection with the furniture business.

The case was tried by the court without the intervention of a jury. The only controversy of fact in the case, relates to the agency of Bertelsman in making the note,

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procuring the indorsement and obtaining the money; whether he did this for himself or for the defendant. It is unnecessary to review the evidence, for there is abundance of it on both sides of the controversy, enough at least to justify instructions or declarations of law on all points upon which they were given. The court rendered a judgment for the plaintiff in the sum claimed, and the only matter to be determined on this appeal is, whether the action of the court in respect to the admission of oral evidence and the giving of the instructions based upon it, is proper.

Two instructions were given at the instance of plaintiff to the effect: 1st, That if the plaintiff indorsed the note by reason of representations made to him by Bertelsman, to the effect that said indorsement was to be used by him as agent of defendant, for the purposes of defendant's business, of which Bertelsman had charge, and that at this time said Bertelsman was the authorized agent of defendant, and that borrowing money for the business was within the scope of the authority of said Bertelsman as agent, and that as such agent Bertelsman was carrying on, for defendant, the furniture business, or was using defendant's name in said business by defendant's permission, and that plaintiff was compelled to pay the note at suit of the holder, then the plaintiff was entitled to recover. 2nd, If Bertelsman was the agent of defendant and in charge of his business, and the defendant, after indorsement by plaintiff and before maturity, and after full knowledge of the facts, notified plaintiff not to indorse again for Bertelsman, and agreed to pay said note, then such conduct of defendant tended to show a ratification of the act of Bertelsman in procuring said indorsement; and if such act was ratified the issues should be found for plaintiff.

The defendant asked four instructions, three of which were given, and the fourth refused. The first was to the effect that no recovery could be had unless the evidence showed that Bertelsman was agent, and it was within the

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scope of his agency to borrow money for the use of the business, and this money was for such use; or that being agent, Brinker afterward ratified his act. The second was to the effect that before the plaintiff could recover, the court must believe from the evidence that Bertelsman was the agent of defendant in the business of defendant, and that it was within the scope of his agency to make and discount the note sued on, or that defendant subsequently ratified the act of Bertelsman as agent and thereby assumed the payment of the note or rendered himself liable therefor. The third was that if Sauer had reasonable notice or information that the agency had been disavowed and denied by appellant, and with such notice indorsed the note, then the appellant was not liable, unless he afterward made himself so. The fourth was that if such an agency was proven as did not authorize borrowing money, giving and discounting notes, the subsequent alleged promise of appellant to pay the note was within the statute of frauds, being the promise to pay the debt of another not in writing.

In lieu of the last refused, the court, of its own motion, gave an instruction to the effect, that though the evidence showed that Brinker made a parol promise to pay the note, yet if Bertelsman was not agent of defendant when the note was made, then the debt was Bertelsman's, and Brinker's promise is within the statute of frauds.

The first point urged by counsel of appellant is, that the court erred in allowing oral evidence of agency to contradict the purport and terms of the note. Perhaps, in an action against the defendant on the note itself, this objection would be good. The defendant's name is not on the note, nor is there anything in the language of the note from which it might be implied that any one outside of the paper was intended to be bound by it. The action is for money paid out to the use of defendant. And the note, as well as the use of it, constituted a portion of the facts going to sustain this action. If the plaintiff had indorsed

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the note of any other person than the defendant or his agent, at the instance and request of the defendant for the purpose of raising funds for the use of defendant in his business, and had been compelled to pay the note on which the funds were realized, his right of action for the money so paid out to the defendant's use would be complete.

It may be remarked that the note in this case, while it was signed by Bertelsman, was also payable to his order; that upon the faith of plaintiff's indorsement he obtained the amount of it from the bank in Washington for the purpose of carrying on the defendant's business, and that it was by him, as defendant's agent, used in that business. The note was payable to Bertelsman, who was the defendant's agent, the money borrowed from the bank on the faith of it was received by such agent, and was used in the defendant's business. Such was the evidence submitted by the plaintiff, and the legal effect of it is not escaped by the statement of Bertelsman on cross-examination, that the money so applied and used in defendant's business, took the place of funds which he had withdrawn from the business, and used in repairs upon the house on the premises where the business was carried on, and for furniture purchased to fit up the house. When plaintiff indorsed the note upon which the money was borrowed, he was informed by Bertelsman that the money was for the use of defendant's business.

The objection that there is no evidence in the record tending to prove that Bertelsman acted in truth as the agent of defendant in obtaining the indorsement of plaintiff and in obtaining the money on that indorsement, is not well taken. The evidence of plaintiff himself, Bertelsman and Hanneken is clearly to that effect, and the existence of such evidence is assumed in the instructions given at the instance of both parties. The same is true in respect to the matter of ratification, about which both sides asked and received instructions. The evidence that defendant, instead of repudiating the act of Bertelsman in obtaining

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the indorsement of plaintiff, agreed to pay the note, coupled with the further evidence that the money borrowed actually went into the business of defendant, goes strongly to sustain a ratification of the transaction, after full knowledge of its material facts. I am unable to perceive any valid objection to the declarations of law given at the instance of plaintiff, and none other than I have noticed already relating to the admission of oral evidence have been brought to our attention. All the declarations asked by defendant were given, except the fourth; and the one given by the court in lieu of it was substantially as favorable to defendant as the one he asked. The judgment is affirmed. All concur.

THE STATE V. PRESTON, *Appellant*.

1. **Weight of Evidence.** The evidence in this case did not so preponderate against the verdict as to justify the court in concluding that the jury were influenced by passion or prejudice, and, therefore, the objection that the verdict is against the evidence must be overruled.
2. **Practice.** Objections to instructions will not be considered by this court unless they were made in the motion for new trial.
3. ———. A remark of the prosecuting attorney construed by the court as having no reference to the failure of the defendant to be sworn on his own behalf, and, therefore, no violation of the statute.

Appeal from Johnson Criminal Court.—HON. J. E. RYLAND,
Judge.

AFFIRMED.

S. P. Sparks for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—Defendant was tried in the criminal court

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of Johnson county upon an indictment charging him with grand larceny in stealing two hogs of the value of \$37. He was found guilty and his punishment assessed at two years' imprisonment in the penitentiary, from which judgment he has appealed to this court, and the chief points relied upon by counsel for a reversal of the judgment are, that the verdict is against the evidence, that the court misdirected the jury as to the law, and that the circuit attorney was allowed to make improper remarks in his argument to the jury.

That defendant stole the hogs in question, we think is clearly established by the evidence, but it is insisted by counsel that the weight of evidence showed them to be under the value of \$30, and that, therefore, the verdict of the jury finding defendant guilty of grand larceny is against the evidence. The evidence as to the value of the hogs was conflicting. James E. Rankin, from whose feed-lot the hogs were taken, and who was a farmer and had been buying and selling hogs for thirty years, testified that the hogs were worth \$32 or \$33. His evidence in this respect was corroborated by that of Robert E. Rankin, William Hunt and Simmerman. On the other hand, witness Clark, who bought the hogs of defendant, testified that he weighed them, and at the market price they were worth \$24.99, and that he paid defendant that sum for them. His evidence was corroborated by that of Hale, a member of the firm for which witness Clark bought the hogs. On this state of the evidence the jury were directed that if they found defendant stole the hogs, and that they were of the value of \$30 or more, they would find him guilty of grand larceny, and if they found them to be of less value than \$30, they would find him guilty of petit larceny. The question as to the value of the hogs was thus fairly submitted to the jury, and the evidence of the hogs being of less value than \$30 does not so preponderate as to justify us in saying that the jury, in arriving at the conclusion that they were worth

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\$30 or more, were influenced by passion or prejudice, especially so, in view of the fact, that they had the witnesses before them, three or four of whom testified that the hogs were worth over \$30. *State v. Cook*, 58 Mo. 546; *State v. Musick*, 71 Mo. 401; *State v. Zorn*, 71 Mo. 415.

It is also insisted that the court erred in giving instructions. This objection cannot be considered by us for the 2. PRACTICE. reason, that it is not alleged in the motion for new trial, that the court misdirected the jury. *State v. Degonia*, 69 Mo. 490; *State ex rel. Rucker v. Rucker*, 59 Mo. 17; *Matlock v. Williams*, 59 Mo. 105.

It is also urged that the prosecuting attorney was permitted to say in his argument to the jury "that no attempt 3. — had been made by defendant to explain his possession of the property." This statement is borne out by the record, and is not regarded by us as referring to the fact that defendant might have been sworn as a witness if he had so chosen, but to the case as made by the evidence. Judgment affirmed, in which all concur.

HILL V. ALEXANDER *et al.*, Appellants.

1. **Partition: PARTIES.** In a suit in the nature of an equitable partition between beneficiaries under a will providing that they should account for, and their respective shares in the estate should be diminished by, the amount of their notes, or the notes of their husbands, held by the testator; *Held*, that the husbands were proper parties to the suit, for the purpose of ascertaining the extent of their indebtedness and determining the distributive interests of the beneficiaries.
2. **Practice in Supreme Court: WITNESSES.** The exclusion of a witness, upon a specific objection as to his competency, will not be considered by the Supreme Court, unless an exception be saved to the ruling of the trial court, and its attention be called to the matter in the motion for a new trial.
3. **Joint Debtors, Release of.** Under the statute, (Gen. St. 1865, p.

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398, § 9,) a creditor might release one joint debtor without impairing his right to demand and collect the remaining indebtedness from the other debtor. *Held*, also, in the case at bar, that no intention to release had been shown.

Error to Howard Circuit Court.—HON. G. H. BURCKHARTT,
Judge.

AFFIRMED.

Chas. A. Winslow for plaintiffs in error.

Major & Shafroth for defendants in error.

PHILIPS, C.—This is in the nature of an equitable partition suit between the beneficiaries under the will of Archibald Hill, begun in 1877. It appears that Archibald Hill left a will executed in April, 1871, and which was duly probated in 1877. The provisions of the will pertinent to this controversy are the fourth and fifth clauses, as follows:

Fourth. It is my will and I devise that all my estate, after the payment of my debts and funeral expenses, real, personal and mixed, be equally divided, share and share alike, between all my children, except my son Archibald B. Hill, and that in such division it is to be considered that at the marriage or time when my children left me, all received equal portions of my estate by way of advancement from me, except the money lent to my said children, or to their husbands, and for which I have their notes, with the interest due thereon, according to the tenor of said notes, and to be accounted for as so much money due from them to my estate, and to form a part of their dividends therein; and if any one of my heirs, or their husbands, whose notes I hold, refuses to account for the same, according to the tenor and effect of said notes, they are not, after such refusal or neglect to pay and account for the same, to have any portion or dividend of my estate, real, personal or mixed. I make this provision in my will to force those

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heirs whose notes I have, to account for the same regardless of the date of the same, or to forfeit by their neglect or refusal any and all interest in my estate.

Fifth. I will and direct that my executors pay to my son Archibald B. Hill, \$100, in full of all that he is to have of my estate, real, personal or mixed, for the reason that I consider that the property and money which he has taken from me and what I have given him amounts to his full share of my estate; and further, because of the undutiful and disrespectful and insulting conduct of my said son, Archibald B. Hill, toward me and members of my family in my presence.

The petition stated in substance, that the testator died seized in fee of a tract of land situated in Howard county, aggregating about 920 acres, described in the petition. The provisions of the will are set out, as also the respective interests of the devisees and legatees. His daughter Martha, intermarried with Jeremiah Alexander, at the time of descent cast was dead, leaving Jeremiah Alexander, her husband, and their children surviving. The petition set out the indebtedness of the heirs, and the husbands of the daughters to the testator. The indebtedness of Jeremiah Alexander was as follows: One note for \$270.27, dated October 27th, 1860, with ten per cent interest from date; one joint note with Archibald B. Hill for \$80, dated August 24th, 1865, interest six per cent from date; and one joint note with Archibald B. Hill for \$3,088, dated November 6th, 1865, with no rate of interest expressed. The children of said Martha and Jeremiah Alexander, the petition alleged, were jointly entitled to one-sixth of the real estate and notes, less the individual note of said Jeremiah, and one-half of the notes executed jointly with A. B. Hill. Like averments are made as to the respective interests of the other heirs. It is then averred that the land is not susceptible of division in kind. The petitioners prayed for a sale of the premises, and after payment of debts of the estate mentioned, they ask that the proceeds be divided

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between the parties according to their respective rights under the will.

The defendants to this petition are said Jeremiah Alexander and children, and the widow and minor children of decedent. The plaintiffs are the other heirs. To this petition the defendant Jeremiah Alexander demurred on the ground that he was not a necessary party to the suit. This demurrer was overruled and he filed no further plea. Celia Long and her husband and Archibald Alexander, two out of the number of Jeremiah Alexander's children, answered, denying that said Jeremiah was indebted to the estate on the two notes executed jointly with Archibald B. Hill, alleging that he signed them as surety for said Hill receiving no benefit therefrom, and then alleged that said Hill was discharged from the payment of said note by the provisions of the will. The defendants, by their guardian *ad litem*, filed the usual answer. And plaintiffs replied, tendering the general issue.

Plaintiffs on the trial read in evidence the will and the notes of Jeremiah Alexander. Defendants then introduced as witnesses two of the defendants, children of Jeremiah Alexander, by whom they sought to prove that in the winter of 1871 they heard their grandfather use language indicating that he had made his will and had given the \$3,088 to their father. Jeremiah Alexander was then offered as a witness, and his competency objected to by plaintiffs on the ground that the other parties to the note, the two Hills, were dead. Plaintiffs then in rebuttal offered evidence tending to prove that Jere. Alexander and A. B. Hill were partners, and that the \$3,088 note was given by them in settlement of what they jointly owed the testator.

The court found the issues for the petitioners, establishing by its decree the interests and rights of the parties, the amount of the debts respectively owing by them to the testator: "that said Jeremiah Alexander, husband of Martha Alexander, deceased, who was a daughter of said Hill, is indebted to said estate by three notes, one

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dated October 27th, 1860, for \$270.27, bearing ten per cent interest from date; one a joint note with Archibald B. Hill, who was son of Archibald Hill, for \$80, dated August 24th, 1865, six per cent interest from date; also a joint note with said A. B. Hill for \$3,088, November 6th, 1865; no rate of interest expressed." And the court decreed in respect of this indebtedness of Jeremiah Alexander that his said children "are collectively entitled to an undivided sixth of said real estate, and the gross indebtedness on said notes, less the indebtedness of Jeremiah Alexander, to the extent of his individual note, and his indebtedness of one-half of the amount of the joint notes with A. B. Hill, as above mentioned."

The parties complaining of this decree are Jeremiah Alexander and his children. They seek a reversal of the decree on three grounds principally: 1st, Because of the refusal of the court to sustain the demurrer of Jeremiah Alexander. 2nd, Because of the exclusion of Jeremiah Alexander as a witness. 3rd, Because by the terms of the will the joint notes of Hill and Alexander were forgiven.

As to the first error complained of, I am of opinion that Jeremiah Alexander was properly made a party de-

1. PARTITION: parties.

fendant. While there are some general rules by which the pleader and court may ordinarily determine who ought to be and who may not be joined as parties, yet the law is flexible enough to permit many cases to be determined by their own peculiar circumstances. Justice Story aptly expresses this idea: "The general rule in relation to parties does not seem to be formed on any positive and uniform principle; and, therefore, it does not admit of being expounded by the application of any universal theorem or test. * * Whether the common formulary be adopted, that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine which is

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useful and valuable, indeed, as a practical guide, but is still open to exceptions, qualifications and limitations, the nature, extent and application of which are not and cannot independently of judicial decision be always clearly defined." Story Eq. Plead., § 76 c. It does not always follow, because no affirmative relief is asked against a party, he may not be joined as defendant with others. A defendant may in some cases be a proper party to a suit, although not a necessary party; and he may be a necessary party not only where no decree relative to the subject matter can be made without him, but "where the defendants in the suit have such an interest in having such person before the court as would enable them to make the objection if he were not a party." *Bailey v. Inglee*, 2 Paige 278.

The will of Archibald Hill is the basis of this suit. It in terms directs that, as a condition precedent to the right of any of the beneficiaries named to share in a division of his estate, any and all sums owing by them to him on notes which he held against them should be brought into *hotch-potch*, nor did this apply alone to his children, but expressly to any notes held by him against the husband of any of his daughters. "And if any of my (the testator's) heirs or their husbands, whose notes I hold, refuse to account for the same, according to the tenor and effect of said notes, they are not, after such refusal or neglect,

* * to have any portion or dividend of my estate." In order then to determine the distributive share and interest of Jeremiah Alexander's children in said estate, it was an essential preliminary step to ascertain and settle the extent of his indebtedness to the testator, on account of these notes found by these executors among the testator's papers. Was this inquiry to proceed against his adult and minor children without the presence of the debtor, the very husband named in the will? Would not they have had the right to stop the case *in limine* if sued alone, and insist on their father being brought into the controversy, a vital feature of which was to ascertain the

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state of the alleged indebtedness between him and their deviser?

In *Warner v. Paine*, 3 Barb. Ch. 630, which was an application for an injunction to restrain defendants from selling property under a mortgage involving, in the progress of the case, a question as to whether an execution had been issued for more than was actually due upon the judgment, it was held that the judgment debtors were necessary parties. In *Gaylords v. Kelshaw*, 1 Wall. 81, it is held that in a suit to set aside a deed in fraud of creditor involving a question of indebtedness on the part of the grantor to the attacking creditor, that this debtor is a necessary party defendant; as it is his insolvency which is to be established.

Jeremiah Alexander ought not to complain of being brought into this controversy, for it involved a settlement and payment of his indebtedness in and through his children. No judgment is taken against him involving any loss to him or imposing on him any costs. How is he injured? His children and co-defendants ought not to complain. They cannot escape the adjustment of their father's debts to the testator's estate so long as they claim anything under the will, and they do not relinquish its provisions.

The case of *Alexander v. Warrance*, 17 Mo. 228, in no wise conflicts with this opinion. That was an ordinary statutory proceeding involving no ascertainment of indebtedness of Warrance to the ancestor as preliminary to the right of partition among his co-defendants. He was merely a *terre tenant* sought to be ejected after the partition among the owners of the land. This was not only bad as multifarious, but bad because it conjoined an action in partition with one in ejectment. *Lambert v. Blumenthal*, 26 Mo. 471. The inapplicability of the doctrine announced in *Alexander v. Warrance* to the facts of this case is further pronounced in the case of *Reinhardt v. Wendek*, 40 Mo. 577.

It is next complained that the court erred in excluding Jeremiah Alexander as a witness. If there was any force

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2. PRACTICE IN SUPREME COURT: witnesses.

in this objection the plaintiff in error has not saved the point. Indeed, the bill of exceptions wholly fails to show that plaintiffs' objection to the competency of this witness was sustained by the court, or even that the witness was excluded, or that defendants saved any exceptions to the imputed action of the trial court. All that appears in the record touching this matter is the following recital in the bill of exceptions: "Defendant had offered Jeremiah Alexander as a witness, to which plaintiff objected upon the ground that the two parties to the note in controversy were dead." This is wholly insufficient to raise here the question so elaborately and ably discussed by defendants' counsel before this court. *Harrison v. Bartlett*, 51 Mo. 170; *State v. Ray*, 53 Mo. 345; *City of St. Joseph v. Ensworth*, 65 Mo. 628; *Margrave v. Ausmuss*, 51 Mo. 561. Nor is it sufficient that an exception should be saved at the time to the objectionable ruling of the court, but the error must be specifically again called to the court's attention in a motion for new trial. *Hannibal & St. Joseph R. R. Co. v. Clark*, 68 Mo. 371. The motion for new trial in this case did not in terms even call the attention of the trial court to this alleged error.

The only remaining question raised by plaintiffs in error, deemed important to be considered is, that by the terms of this will the notes of A. B. Hill to which
 3. JOINT DEBTORS, RELEASE OF. Jeremiah Alexander was a party, were forgiven. At common law a release of one of several obligors discharged the others, provided it was a technical release under seal. *McAllister v. Dennin*, 27 Mo. 42. But under section 9, page 398, General Statutes 1865, then in force, a creditor might release one joint debtor, "without impairing his right to demand and collect the balance of such indebtedness from the other debtor." The fifth clause of the will would hardly indicate a purpose on the part of the testator to release Hill, much less Alexander. The testator asserts in energetic language, his reason for ex-

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cluding his son from a further participation in his estate. It was because "I consider the property and money which he has taken from me and which I have given him amounts to his full share;" and because of his son's reprehensible conduct toward the testator and family. There is in this not much of the spirit of forgiveness. To get at the testator's intent all the provisions of his will should be construed together. In the fourth clause he directly mentions "the money lent to my (his) children, or to their husbands, and for which I have their notes * * * to be accounted for as so much money due from them to my estate." This will was executed the 11th day of April, 1871; while defendants' witnesses, by whom they sought to show, *de hors* the will, the purpose of the testator to release this note, testified to statements made by him "in the winter of 1871." If it was the mind of the testator to release these notes, why did he not say so in this will? Why did he not surrender the notes to the makers? Why did he retain them in his possession for six years afterward, and until his death? The trial judge very properly disregarded in his finding such evidence of interested heirs against a dead man whose solemn testament and acts *in pais* contradicted them. I do not think these objections well taken, and, therefore, affirm the judgment of the circuit court. In this opinion MARTIN, C., concurs; WINSLOW, C., not sitting, having been of counsel.

THE STATE *ex rel.* ESTES V. GAITHER *et al.*, Appellants.

The Motion for New Trial. To enable the Supreme Court to consider the questions presented by the motion for new trial, it is not necessary that the filing of the motion and the action of the court thereon appear in what is known as the record proper; it is sufficient if they appear in the bill of exceptions.

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Appeal from Scott Circuit Court.—HON. D. L. HAWKINS,
Judge.

AFFIRMED.

W. R. Donaldson and Smith & Krauthoff for appellant.

Thoroughman & Valliant for respondent.

HOUGH, C. J.—This is an action against the defendants as sureties on an attachment bond. The bill of exceptions recites that the motion for a new trial was filed within four days after the trial, and was overruled by the court, but the transcript before us is otherwise silent upon the subject; and the question is presented, whether this court will consider the matters of exception presented for review, when the filing of the motion for a new trial and the action of the court thereon appear only in the bill of exceptions.

It has always been held in this State that the motion for a new trial is not part of the record proper and must be preserved by a bill of exceptions. It is also settled by the decisions of this court, that the action of the trial court on the motion for a new trial, is a matter of exception, and not of error, and it is accordingly held, that when the bill of exceptions fails to show that the action of the court in overruling the motion for a new trial was excepted to, this court will not review such action of the trial court. *Hart v. Walker*, 31 Mo. 26; *Bateson v. Clark*, 37 Mo. 34; *State v. Marshall*, 36 Mo. 403, 404. Now it is plain that if the action of the court in overruling the motion for a new trial is a matter of exception, such action cannot be regarded as belonging to the record proper, and must be preserved in the bill of exceptions. The correctness of this view is apparent when we consider that the only object of the motion for a new trial is to give the trial court an opportunity to review, or reconsider those rulings which

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do not constitute a part of the record proper, and that an adherence to such rulings, by overruling the motion, can, therefore, occupy no higher plane, or possess greater dignity than the original rulings during the progress of the trial.

We are also of opinion that while the filing of the motion is required by statute, (R. S., § 3536,) to be entered upon the minutes, and must, therefore, go upon the record, this does not make such filing a part of what is known as the record proper, and such filing and the date thereof are properly shown by the bill of exceptions. The record proper has been declared to consist of the petition, summons and all subsequent pleadings, together with the verdict and judgment, and if material error appear in such record, we will reverse the judgment whether any exceptions were saved or not. All other matters occurring during the progress of a cause, are matters of exception, and such matters, together with the action of the court thereon, and the exceptions thereto, must be preserved in a bill of exceptions. The errors alleged to have been committed at the trial are, therefore, before us for review.

The appellant contends that the damages are excessive. There is testimony to support the verdict, and the instructions taken together correctly state the measure of damages. In such cases we cannot interfere.

The remarks of the plaintiff's counsel in his closing speech to the jury, while not in good taste, or warranted by the evidence, are not of such a character as to justify us in reversing the judgment.

The judgment is affirmed. All concur.

UTLEY V. TOLFREE *et al.*, Appellants.

- 1 **Amendment.** There is no substantial difference between the original and amended petitions in this case.
- 2 **Evidence:** SWORN STATEMENTS IN ANOTHER SUIT. The sworn answers of a garnishee to interrogatories, are admissible in evidence against him in a suit by a stranger to the garnishment proceedings.
3. **Instructions** are properly refused when there is no evidence on which to base them.
4. **Bailment:** DEPOSIT WITH BANK FOR THIRD PARTY: RIGHTS OF THE LATTER. If bankers receive money from a customer on an express promise to pay it to a third party, the latter may maintain an action for it if not paid; and it will be no defense that the money was deposited in the customer's name with his consent, or that he at the time promised to make a further deposit to cover his own indebtedness to the bank and failed to do so.
5. **Instructions.** The court again signifies its disapproval of the practice of asking numerous and voluminous instructions.

Appeal from Polk Circuit Court. — HON. R. W. FIAN,
Judge.

AFFIRMED.

J. B. Upton and J. D. Abbe for appellants.

T. G. Rechow and O. D. Knox for respondents.

HENRY, J.—Plaintiff sued defendants for \$360, which, in his petition, he alleges was, on the 30th of April, 1875, deposited by W. N. Mitchell in defendants' bank to be paid, and which defendants then agreed to pay, to plaintiff, whenever he should demand it, which he did on the 3rd day of June thereafter, and defendants refused payment thereof. The answer denied the allegations of the petition, and also alleged that on the 30th of April, 1875, said Mitchell deposited with them \$567.20, and requested them to pay \$360 of the amount to plaintiff, which they promised to do, on condition that, within ten days thereafter, Mitchell should deposit with them an amount sufficient to

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cover his indebtedness to the bank, on a running account with the bank and notes held against him; that this he failed to do, and soon after that date failed and made an assignment, and that plaintiff did not demand said sum of \$360 until after said assignment. The replication denied the special matter. There was a trial, which resulted in a verdict and judgment for plaintiff, from which defendants have appealed.

After the evidence had all been introduced on both sides, the plaintiff, on leave of court, filed an amended petition which, however, did not contain anything material not embraced in the original petition, and we are unable to see why it was filed. Appellants' counsel contend that it states a different cause of action; that the original petition claimed that the money was deposited to plaintiff's credit in the bank, while the amended petition alleged no deposit to his credit, but a request on the part of Mitchell, and a promise by defendants, to pay the sum of money to Utley. The amended petition states: "That on the 30th day of April, 1875, W. N. Mitchell left, or deposited with defendants, the sum of \$360 to be by them paid to plaintiff, to whom Mitchell was indebted to that amount, and that defendants then agreed to pay the same to plaintiff." The original states the same facts substantially, the only noticeable difference being that the word "left" does not appear in the original petition. Whether deposited in the bank to plaintiff's credit or left with the defendants, (private bankers,) to be paid to plaintiff, makes no difference in his right to the fund. If deposited to his credit, he had the absolute right to the money, and if received by defendants on their promise to pay it to plaintiff, the obligation of defendants to pay it to him was complete. The same cause of action alleged in the amended petition was tried on the original petition and answer, and both sides were heard upon all the issues that could have been joined on the amended petition, and defendants were not prejudiced by having no opportunity to answer the amended petition.

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The defendants were summoned as garnishees in a suit instituted by a creditor of Mitchell, and answered certain interrogatories propounded, wherein they stated that they had no money in their possession or control belonging to Mitchell, and also certain other statements which tended to sustain the allegations in plaintiff's petition, and it is insisted that it was error to admit this evidence. They were the statements of defendants under oath to facts bearing upon the issues in this cause, and we know of no principle or authority upon which they should have been excluded. If damaging to defendants' case, it was because it tended to prove the facts relied upon by plaintiff. If the evidence did not so tend, we are unable to perceive how it could have prejudiced them.

The instructions for plaintiff are not objectionable. The court refused several asked by defendants to the effect that if the agreement made by them was to pay Utley on condition that Mitchell made a deposit with them, within ten days, of a sufficient amount to cover his indebtedness to the bank, the verdict should be in their favor. This correctly stated the law, but there was no evidence upon which to base it. The nearest approach to it is found in the testimony of defendant Dunnegan, who in his cross-examination says: "I agreed to pay Utley \$360 if he called for it upon the representation then made about another bill." He did not promise to pay Utley, provided the other bill were deposited, but upon the representation that it would. Relying upon Mitchell's promise to that effect he made an unconditional promise to pay the \$360 to Utley.

The court also refused an instruction declaring that although the money was deposited by Mitchell with defendants to be paid to plaintiff, and they agreed to pay it to him, yet, if with Mitchell's assent it was entered on the books of the bank to Mitchell's credit, that fact exonerated them from any obligation to pay it to Utley. Whether it was placed there to the credit of Mitchell or Utley, if re-

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ceived by the bank on the promise of the bankers at the time it was so received, to pay it to Utley, it was received by them for him. As against them it was his money, and they had no more right to withhold it from him than if it had been handed by Mitchell to them to be carried and delivered to Utley. Nor did the fact, if true, that Mitchell fraudulently and falsely promised to make a deposit to cover his indebtedness to defendants, relieve them of their obligation on their agreement to pay Utley. Mitchell was under no legal obligation to deposit with defendants the money intended for Utley, and if they had refused to agree to pay it to Utley, he could have retained it and paid it to Utley or deposited it elsewhere for him. Instructions on this theory asked by defendants were, therefore, properly refused.

Numerous other instructions were given, and many were asked and refused. We have not copied them into this opinion; they are too numerous and voluminous; and once more we would suggest that cases would be more satisfactorily tried in the lower court, and reviewed here, if counsel would not encumber the record with so many instructions. Two, three at most, in this case, would have embraced every phase of the evidence and the law applicable to it.

All concurring, the judgment is affirmed.

THE STATE V. WILLIAMS, *Appellant*.

1. **Criminal Law: CONSTITUTIONAL LAW: FALSE PRETENSES.** Imprisonment in the penitentiary for two years is not a cruel or unusual punishment within the inhibition of section 25, article 2 of the Constitution of 1875, for the crime of obtaining money by false and fraudulent representations.

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2. ——— : ——— : STATUTE VOID IN PART. The maximum punishment imposed by a statute for a crime may be regarded as cruel and unusual within the inhibition of the constitution, without affecting the validity of the statute so far as it imposes a minimum punishment not obnoxious to the objection.
3. **False Pretenses.** The form of indictment for obtaining money by false and fraudulent representations prescribed by section 1561, Revised Statutes 1879, is sufficient. Following the *State v. Fancher*, 71 Mo. 460.
4. **Evidence : PRACTICE IN SUPREME COURT.** The Supreme Court will not consider the competency of evidence, where no exception is shown to have been taken to the action of the trial court in receiving the same.
5. ——— : ——— : GOOD CHARACTER. Where the defendant offers evidence of his good character, the State may prove his admissions of facts impeaching his character.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Wm. Bush for appellant.

No punishment for a common law offense can be imposed which is for life or indefinite or unlimited. *Cooley's Const. Lim.*, (3 Ed.) p. 328; *Done v. People*, 5 Park. 364; *State v. Danforth*, 3 Conn. 115; *Oakley v. Aspinwall*, 3 Comst. 568. The statute allows the pleading of conclusions of law, and is a special law applying only to a certain class of defendants and not uniformly to all. *Wiggins v. Graham*, 51 Mo. 17; *Pier v. Heinrichoffen*, 52 Mo. 333. Defendant's imprisonment in the penitentiary could only be proved by the record. *State v. Rugan*, 68 Mo. 214.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—The indictment in this case is based on section 1561 of the Revised Statutes, and charges defendant with the crime of obtaining \$3.10, the property of another, by the use of a trick, deception and false representation. He was tried, convicted and sentenced to two

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years' imprisonment in the penitentiary, which judgment was affirmed on defendant's appeal to the St. Louis court of appeals, and from this judgment of affirmance he has appealed to this court; and the first point urged by counsel as a ground for reversal is, that said section 1561, on which the indictment is framed, is in conflict with section 25, article 2 of the constitution, which provides "that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The punishment for the offense with which defendant is charged, prescribed in section 1561, is by imprisonment in the penitentiary for a term not less than two years; and as no maximum punishment is provided for in said section, a person convicted of the offense defined therein might be punished by imprisonment for life, under section 1660, Revised Statutes, which provides "that when any offender is declared by law punishable upon conviction by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed."

That punishment in the penitentiary is not such cruel and unusual punishment as is forbidden by the section of the constitution invoked by counsel, we think is clear, because it is the punishment prescribed, not only in this, but in all the states, for crimes (less than capital) committed against persons or property or the safety of well ordered society, which in legislative estimation amount to felonies, and such punishment has never been regarded as either cruel or unusual. The interdict of the constitution against the infliction of cruel and unusual punishments would apply to such punishments as amount to torture, or such as would shock the mind of every man possessed of common feeling, such for instance as drawing and quartering the culprit, burning him at the stake, cutting off his nose, ears

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or limbs, starving him to death, or such as was inflicted by an act of parliament as late as the 22 Henry VIII, authorizing one Rouse to be thrown into boiling water and boiled to death for the offense of poisoning the family of the Bishop of Rochester. As was said in the case of *James v. Commonwealth*, 12 Serg. & Rawle 220, "it must be a very glaring and extreme case to justify the court in pronouncing a punishment unconstitutional on account of its cruelty." If under the statute in question, a punishment by imprisonment for life of one who is convicted of the offense therein defined, should be inflicted, it might well be said that such punishment would be excessive, or rather entirely disproportioned to the magnitude of the offense, yet notwithstanding this, there is high authority for saying that "the question whether the punishment is too severe and disproportionate to the offense, is for the legislature to determine." *Commonwealth v. Hitchings*, 5 Gray 482.

In addition to this, it may be further said that it is well settled that when a part of a statute is unconstitutional, that will not authorize the court to declare the remainder of the statute void, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed one without the other. *Wellington, Petitioner*, 16 Pick. 87; *Warren v. Major*, 2 Gray 84; *Commonwealth v. Clapp*, 5 Gray 100. Under the operation of this rule should it ever be considered that imprisonment for life authorized by the statute for such an offense as defendant is charged with, is obnoxious to the constitutional provision forbidding the infliction of cruel and unusual punishment, it would not, therefore, follow that so much of it as authorizes imprisonment for the minimum punishment by two years' imprisonment would also be unconstitutional.

It is also insisted that the indictment is insufficient. This objection is answered by the case of the *State v.*

2. ———: ———: statute void in part.

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3. FALSE PRETENSES *Fancher*, 71 Mo. 460, where an indictment founded on the same statute as the one in this case, and to which the same objections here made were interposed, was held to be sufficient.

It appears from the record that defendant represented to the prosecuting witness, who had some apples in his wagon for sale, that he was authorized to buy supplies for the Laclede hotel in the city of St. Louis, and that he would take his apples if he would drive his wagon around to said hotel; that on the way defendant requested prosecutor to stop before a saloon as he could there sell his apples for him; that the prosecutor stopped as requested, and gave the defendant the apples, (the price of which was \$1.90,) who took them into the saloon and soon returning told the prosecutor that he had sold the apples but the saloon-keeper had nothing less than a five dollar bill, and that if the prosecutor would give him \$3.10 with which to make the change, he would bring him the five dollar bill; the prosecutor handed defendant the \$3.10, who went into the saloon, and not returning with the five dollar bill, prosecutor stepped into the saloon and inquired of the keeper if he had bought some apples of a colored man, to which he replied that he had not, that the colored man came into his saloon and obtained his permission to set some apples behind the door or counter, and went out the back door and disappeared. It is objected that the court in allowing the witness to state what the saloon-keeper said was in error. This objection cannot be considered by us for the reason that the record fails to show that defendant excepted to the action of the court in receiving the evidence over his objection.

Inasmuch as defendant had offered evidence in support of his character, the court did not err in allowing the

5. _____: _____: State to show that defendant admitted to good character. the officer who arrested him that he had been in the penitentiary, and had been but a short time out of the work-house.

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Finding no error, and the verdict being sustained by the evidence, the judgment is affirmed. All concur.

HELTZELL V. THE CHICAGO & ALTON RAILROAD COMPANY
et al., Appellants.

1. **Railroad: LIEN OF MATERIAL MEN: NOTICE, SERVICE OF, UPON CORPORATIONS.** In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer, whose official relation to the governing body, or managing agent, or chief officer, would make it his duty to communicate the notice, will be sufficient. The secretary is such an officer.
2. ———: ———: **LIMITATION.** Where materials are furnished for the construction of a railroad in car-load lots, under separate and independent orders, no lien therefor can be acquired under article 4, chapter 47 of the Revised Statutes of 1879, for such car-loads as were furnished more than ninety days before the filing of the account claimed to be a lien, although others were furnished within that time.
3. ———: ———. Materials furnished to a contractor for, and used by him in the construction of, a railroad, are to be regarded as furnished to the railroad.

Appeal from Audrain Circuit Court.—HON. G. PORTER,
Judge.

REVERSED.

Macfarlane & Trimble for appellants.

If all the materials are furnished under one contract, or one request, one indivisible lien will be created, but when under several contracts or requests, each separate contract becomes a separate lien. It was a question of fact, to be submitted under proper instructions, whether there was only one contract or whether each load was a

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separate contract. *Stine v. Austin*, 9 Mo. 554; *Viti v. Dixon*, 12 Mo. 482; *Livermore v. Wright*, 33 Mo. 31; Phillips Mec. Liens, §§ 324, 326; *Merchard v. Cook*, 4 Greene (Iowa) 115; *Diller v. Burger*, 68 Pa. St. 432.

S. M. Smith for respondent.

HOUGH, C. J.—The Kansas City, St. Louis & Chicago Railroad Company is the owner of a railroad extending from Mexico, Missouri, to Kansas City, Missouri. The Chicago & Alton Railroad Company was the contractor for building said road, and is now the lessee thereof; Moraghan, Sims & Co. were sub-contractors under the Chicago & Alton Railroad Company for building a portion of said road; and this suit was brought against said sub-contractors, contractor and lessee, and owner, to recover the price of 460 barrels of cement sold by the plaintiffs to said Moraghan, Sims & Co. to be used in the construction of said road, and to establish a lien on said railroad therefor under the statute. The trial was before the court without the aid of a jury, and resulted in a verdict for the plaintiffs for \$900.

The return of service of notice of the lien on one of the defendants, is as follows: "Served this notice in the city of St. Louis on the 5th day of October, 1878, by delivering a copy thereof to R. P. Tansey, secretary of the Kansas City, St. Louis & Chicago Railroad Company, the president thereof being absent from the city and could not be found." (Signed) "John Finn, sheriff city of St. Louis."

Six cars of cement containing eighty barrels each, and one car containing sixty barrels, making in all 540 barrels were furnished by the plaintiffs to the sub-contractors, of which forty or fifty barrels were returned by said sub-contractors to themselves at St. Louis. The testimony shows that all the cement charged for in plaintiffs' account was used in the construction of the road, and that part thereof

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was furnished more than ninety days before the 10th day of October, 1878, the day on which the lien was filed. There was also testimony tending to show that each car-load was a separate and distinct purchase.

The principal questions presented for determination relate to the service of notice on the Kansas City, St. Louis & Chicago Railroad Company, and the action of the court in refusing instructions numbered eight and ten, asked by the defendant, which are as follows:

8. If each bill of cement was furnished Moraghan, Sims & Co., by plaintiffs under a separate contract, then no such bill can constitute a lien on the railroad, unless it was furnished within ninety days next before the 10th day of October.

10. If the cement was ordered in car-load lots, each order being separate and independent of any other, and in like manner each invoice became due and payable upon shipment, or in any particular time after, then they were separate and distinct transactions, and not one contract, and the rule of the last item in the account giving life to the whole account, does not apply, and no lien exists for any material furnished more than ninety days prior to October 10th, 1878.

It is provided by law how and upon whom all writs of summons and all notices, orders and rules in the progress of any cause directed to a corporation, shall be served; but there is no statute of this State prescribing upon what officer, or officers of a domestic corporation notices shall be served which are required by law to be served before the institution of a suit in order to fix a lien or give a right of action. In the absence of any legislative enactment providing how such notices shall be served, it would seem reasonable to hold that when service cannot be had on the chief officer, or managing agent of the corporation, service on any officer whose official relation to the governing body or managing agent or chief officer of the corporation, would make it

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of material men:
notice, service of
upon corporations.
tions.

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his duty to communicate such notice to such body, agent or officer, will be sufficient. We regard the secretary of a corporation such an officer, and, therefore, hold the service of notice therein recited to be sufficient.

The two instructions above set forth should have been given, as they announce correct principles of law, and 2. ———: there was sufficient testimony upon which to limitation. base them. *Livermore v. Wright*, 33 Mo. 31; *Allen v. Frumet Mining and Smelting Co.*, 73 Mo. 688.

It has also been contended in argument that as the law only gives a lien for the materials furnished to the rail- 3. ———: ———. road company, whose road is being constructed, the plaintiff could acquire no right to a lien for materials furnished by them to the sub-contractors, Moraghan, Sims & Co. Materials furnished to a contractor for the construction of a railroad, and used by him in the construction of such road are in the eye of the law furnished to the railroad.

For error committed by the court in refusing to give the 8th and 10th instructions, asked by the defendants, the judgment will be reversed and the cause remanded. The other judges concur.

CROSS V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

1. **Railroad Track in Public Street: LIABILITY OF COMPANY FOR DAMAGES.** Where a municipality, being authorized by its charter, confere upon a railroad company the right to lay its track in a street, the right is to lay it on the grade of the street. If embankments are raised by the company to lay the track upon, above the grade, the company will be liable to property holders in damages for obstructing the access to their property.
2. ———: ———: **PLEADING.** The petition in an action to recover such damages need not allege that the erection of the embankment was unnecessary.

Appeal from Chariton Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

Wells H. Blodgett for appellant.

A. W. Mullins for respondent.

HENRY, J.—The petition alleges that plaintiff is the owner of certain lots in the city of Brunswick, upon which there are dwelling and other houses of the value of \$2,000; that said lots front on Mulberry, corner on Jackson street in said city, and that prior to the acts of defendant, herein complained of, said streets were dedicated and used as public highways; that in the year 1876 the defendant, without authority of law, and against the rights of plaintiff, wrongfully constructed its railroad track upon Mulberry street in front of said lots, and dug ditches and erected high embankments, whereby said street and the crossing of Jackson street were so obstructed that they could not be used by plaintiff for the benefit of said lots, to her damage in the sum of \$1,000. The answer alleged authority from the corporate authorities of said city to lay its track upon said street, and that defendant did not dig up the earth, subvert the soil, or make embankments or dig ditches in said street other than was necessary in the proper construction of the road; and the replication admitted that defendant had the permission of the corporate authorities of the city to lay its track upon said street.

The evidence for plaintiff tended to prove that the embankment on which the track was laid, was from twelve to eighteen inches above the level of the street, and that defendant dug ditches on either side of the track nearly two feet deep, and that plaintiff's property was thereby diminished in value one-half. Witnesses for defendant

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testified that plaintiff's property was not injured by the road.

The court, for the plaintiff, instructed the jury as follows :

1. Although defendant had a right to locate and build its railroad along and upon Mulberry street, yet, if it located and constructed its railroad in said street in front of plaintiff's lots by making its road-bed and grade above the grade or level of said street, and has thereby unnecessarily impaired the usefulness of said street, or has failed to restore said street to its former condition of usefulness, and plaintiff's property has been injured or lessened in value thereby, then the jury should find their verdict for plaintiff, and will assess her damages at such sum as they may believe from the evidence her property has been reduced in value by such construction of defendant's railroad in said street, not exceeding the sum of \$600.

The following, asked by defendant, were refused :

2. If defendant laid its track by permission of the corporate authorities of Brunswick in Mulberry street upon the grade of said street, then defendant is not liable for any damages resulting from such manner of laying said track, though they may have had to build up to the end of the cross-ties on the street to make it level with the grade of said street in the center or highest point upon which said track was laid.

3. Under the pleadings and evidence in this case the plaintiff is not entitled to recover.

4. If the jury find from the evidence that the city authorities of the city of Brunswick granted the right to defendant to lay and run its railroad along Mulberry street, and if they further find that defendant did lay the track along said street, and that the railroad so laid did not, and does not, prevent the public from using the street, except upon that part of it on which the track is laid when in actual use by defendant for the passage of trains, then they

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are instructed that under the pleadings the verdict should be for defendant.

5. If the jury believe from the evidence that defendant had authority and permission from the city of Brunswick to locate and construct its railroad along Mulberry street, then they are instructed that such location and construction was neither unlawful nor wrongful, and that under the pleadings in this case the plaintiff cannot recover, and the verdict should be for defendant.

From a judgment in favor of plaintiff for \$240, defendant has appealed, and it is contended by its counsel that on the petition plaintiff had no right to recover, because, as he insists, the petition complains of a nuisance, created by malfeasance, while the only instruction given at plaintiff's request, authorized a recovery for one created by misfeasance or for the negligent or improper performance of a lawful act.

In the case of *Randle v. Pacific R. R. Co.*, 65 Mo. 325, upon which counsel mainly relies, the petition contained no allegations that, by embankments, ditches or other obstructions placed in the street in the construction of the road, his property was injured. The only complaint was that the road was laid on Poplar street, and that soot and smoke emitted by the engines drawing the trains of cars, and heavy trains of cars passing over the road shaking his building, rendered the occupation of the building uncomfortable. The only complaint was of the laying the track which the company was authorized to do, and of those incidents to the operation of the road which were necessarily included in the right given to lay the track on the street. Conceding the right to lay the track in the street and its proper construction at the grade of the street, the company was not liable for any inconvenience to property holders resulting from a proper and prudent operation of the road. The petition in the case at bar alleged that in constructing the road, the company made high embankments in the street,

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and dug ditches on either side of the track of the railroad which obstructed access to her lots.

The doctrine on this subject is stated by Judge Napton in his separate concurring opinion in the case of *Tate v. M., K. & T. R. R. Co.*, 64 Mo. 158, as follows: "It is further determined that where the charter of the municipality so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipal corporation nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. (*Porter v. N. M. R. R. Co.*, 33 Mo. 120.) But these principles apply only to a railroad constructed on the grade of the street, when the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for side-tracks or other structures for the convenience of the road." The doctrine announced by him is, that the right conferred by the municipal authorities upon a company to lay its track upon the street of a city is to lay it on the grade of the street, and that if embankments are raised by the company to lay the track upon, above the grade, the company is liable to property holders in damages for obstructing the access to their property. To the same effect are *Lackland v. N. M. R. R. Co.*, 31 Mo. 180; *Swensen v. City of Lexington*, 69 Mo. 157.

The instructions No. two and four, asked by defendant and refused, were properly refused, because there was no evidence to base them upon. No witness testified that the embankment was not above the grade of the street, and testimony to the effect that plaintiff's property was not injured by the laying of the track in the street, is not equivalent evidence. Such witnesses may have thought that other benefits to the property from the laying of the track in the street, was equal in value to the detriment occasioned by the embankments.

It is plausibly urged that the petition should allege that the erection of the embankment was unnecessary, and

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2. ———: ———: resulted from a negligent construction of the pleading. road, and while it is not so clear, upon principle, that this allegation is not necessary, yet in all of the cases above cited, the petitions were similar to the one under consideration in that respect, and on these authorities the judgment is affirmed. All concur, except Judge RAY, who, having been of counsel, did not sit in the case.

NUGENT V. CURRAN, *Appellant*.

1. **Death of one Party to a Contract: COMPETENCY OF ANOTHER AS A WITNESS.** Where one of two parties jointly bound by a contract is dead, the adverse party is not thereby disqualified as a witness in an action upon the contract between himself and the survivor.
2. ———: ———. In an action by the payee against a surety in a note, the surety pleaded and at the trial testified to facts constituting an estoppel against the plaintiff, with which, however, the principal had no connection. The principal was dead. *Held*, that this fact did not disqualify the plaintiff from testifying in his own behalf.
3. **Instructions.** Where instructions are given which fairly present all the issues to the jury, and correctly declare the law, it is not error to refuse other instructions on the same subject.
4. ———. An instruction which is inconsistent with the defense made or submits a defense not made by the answer, is properly refused.

Appeal from Pettis Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

Snoddy & Short for appellant.

G. C. Heard and *Geo. P. B. Jackson* for respondent.

WINSLOW, C.—This is an action on a promissory note executed by appellant and one Byrne to respondent, dated

September 2nd, 1872, at one day, with interest at ten per cent.

The answer admits the execution of the note, and sets up as a defense, that appellant signed the note as surety; that, about three years after its execution, appellant learned that Byrne was in failing circumstances, of which he informed respondent, and told her that he wanted her to see Byrne and get other security and release him; that appellant and respondent saw Byrne in April, 1876, who, at their joint request, gave respondent a mortgage on eighty acres of land, in Pettis county, Missouri, to secure the payment of the note sued on, and another note for \$200 due by Byrne and wife to respondent; that this mortgage was given on the express agreement that the time of payment of the note sued on should be extended five years, and appellant released from any further liability on said note, and that appellant never consented to be bound by the stipulation extending the time of payment. As a further defense, it is alleged, in substance, that a few days after the execution of the mortgage, appellant and respondent met, when the respondent told appellant she never intended to make the money out of him, that if she could not make it out of Byrne she would lose it; that at the time the mortgage was executed and the time extended, and at the time of the conversation aforesaid, appellant could have secured himself out of the property of Byrne, but relied on his release under the contracts and conversations aforesaid, and made no effort to do so; and that Byrne has since died insolvent. These matters are set up by way of estoppel.

The reply admits the execution of the mortgage, but alleges that it was given as additional security, and denies all the other averments of the answer.

The trial was by jury. No evidence is preserved in the record; but it is stated, generally, that appellant introduced evidence tending to sustain all the allegations of his answer, and the probable insolvency of Byrne. Also, that re-

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spondent introduced evidence tending to disprove the answer and sustain her reply; and tending to show that there was no extension of time, that appellant was not released, that Byrne was insolvent at the time of making the mortgage, and that appellant prevailed on him to execute the mortgage.

On the trial, the court gave seven instructions for respondent, five of which related to the defense growing out of the extension of time. Counsel for appellant make no point on these instructions, in their brief, and we presume their correctness is conceded.

Appellant offered the wife of Byrne as a witness, and offered to prove by her conversations between her husband and respondent, tending to show an extension of the time of payment of the note sued on. This testimony was excluded, and appellant excepted; but counsel make no mention of the point in their brief, and we presume it to have been abandoned.

Respondent offered herself as a witness as to conversations between appellant and herself relating to his release from payment of the note. This was objected to, because Byrne, one of the makers of the note, was dead. The objection was overruled, and appellant excepted. Counsel still insist on the point, and submit it on all the well-known authorities, without pointing out those particularly applicable. Appellant and Byrne were parties to the contract adverse to respondent, and it has been held that the statute does not apply where such is the case, and only one of the adverse parties is dead. *Fulkerson v. Thornton*, 68 Mo. 468; *Amolett v. Montague*, 75 Mo. 43.

Besides, the testimony related solely to conversations between appellant and respondent, as to which appellant had testified, tending to disprove the estoppel set up in the answer, which was an issue exclusively between them, and the "cause of action in issue and on trial." Neither of the parties to this issue were dead.

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The cause of action, or defense, which is the same thing, originated in new matter set out in the answer by way of a defense in favor of appellant alone, which was put in issue by the reply. The answer does not allege that Byrne had any connection with these matters; and they could constitute no defense to him, or his administrator, if sued on the note. The respondent was competent on this issue. *Poe v. Domic*, 54 Mo. 119; *Martin v. Jones*, 59 Mo. 181.

The remaining question in the case relates to the action of the court in giving and refusing instructions in regard to the second defense alleged in the answer. For the plaintiff, the court gave the following instruction, in connection with an instruction that the burden of proof was on defendant to make out his defense: "You are instructed, in relation to the second defense, that if you should believe that plaintiff stated to the defendant that she did not intend to make the money out of him, or that if she could not make it out of Byrne, she wouldn't try to make defendant pay it, still such statements did not release defendant. To release him under this second defense, you must find from the evidence that the defendant was only a surety on this note; that plaintiff made to him such statements as induced him to believe that she had released him; that he relied upon the same, and that, in consequence of such statements made by plaintiff, the defendant forebore and omitted to take from Byrne security against paying this note; and you must further find that Byrne was, at the time, able to give such security, and that defendant's failure to obtain such security resulted from assurances made to him by the plaintiff."

The following instruction, asked by the defendant, was refused by the court: "It is admitted that the defendant signed the note sued on as a mere surety. And the court instructs the jury that if they believe from the evidence that some time prior to the 22nd day of April, 1876, the defendant went to plaintiff and requested to be released as surety on said note, and that on or about the said 22nd day

of April, or afterward, and before the commencement of this action, the plaintiff agreed to release him or look to Byrne alone for the payment of the same, or that the acts, conduct or declarations of plaintiff in the premises, were such as to justify defendant reasonably to believe that she had released him as surety, or would look to Byrne alone for the payment of the note, and that defendant did, in consequence thereof, believe that he was discharged, and on that account took no measures to secure himself against his liability as such surety; and they further believe that he could, in all probability, have procured indemnity against the note sued on, either by suit or otherwise, or have collected the same from Byrne, but for such acts, declarations or conduct of plaintiff having led him to believe he was no longer liable, until the said Byrne became hopelessly insolvent, the plaintiff is estopped from recovery in this action, and the finding must be for the defendant."

Counsel for appellant do not complain, in their brief, that the instruction given for plaintiff, on the subject of the second defense, was erroneous, but insist that the court erred in not giving the one asked by defendant. A careful examination and comparison of the two instructions will show no substantial difference between them. The difference is only in language; the legal propositions contained in one find clear equivalents in the other; and the one given by the court possesses the merit of closer conformity to the pleadings and the evidence; while the one refused contains some verbal inaccuracies justifying its refusal. Manifestly, the question of estoppel was as fairly submitted to the jury as the pleadings and evidence justified, and the appellant has no just cause of complaint on that ground.

It is suggested that the refused instruction properly presented the question of defendant's release as surety, on the facts of the case, and should have been given. It was not written to cover that defense, which is a sufficient reason why it does not embrace it, and should not have been

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given on that ground; besides, it omits important elements of that defense. The court gave six instructions as to the first defense, five for plaintiff and one for defendant, none of which are complained of, which fairly submitted this defense to the jury. Where instructions are given which fairly present all the issues to the jury, and correctly declare the law, it is not error to refuse other instructions on the same subject. *Whetstone v. Shaw*, 70 Mo. 375; *Anthony v. Bartholow*, 69 Mo. 186; *State v. Gann*, 72 Mo. 374; *State v. Walton*, 74 Mo. 270; *Martin v. Smylee*, 55 Mo. 577.

Appellant asked another instruction, which the court refused, to the effect that "if the parties thereto" made a
4 — contract for the extension of the time of payment of the note, the effect was to extend the time of payment five years, that being the time agreed upon, and the note was, therefore, not due at the commencement of the suit, in consequence of which the finding must be for defendant, whether he was released as surety on the note or not, by the extension of time, or otherwise. The language of this instruction is significant: "If the parties thereto," that is, the parties to the agreement extending the time, made an agreement, then defendant cannot be sued on the note because it is not due. The answer alleges that defendant "never consented to be bound by the stipulation between Byrne and plaintiff deferring the time of payment;" and the record recites that defendant "introduced evidence tending to sustain all the allegations of his answer." Defendant, then, was not a party to the agreement; no such issue as that presented by the instruction is made by the pleadings; the instruction is inconsistent with the defenses made, and submits a defense not made by the answer. It was properly refused. *Bruce v. Sims*, 34 Mo. 246; *Camp v. Heelan*, 43 Mo. 591; *Capital Bank v. Armstrong*, 62 Mo. 59; *Hassett v. Rust*, 64 Mo. 325; *Chapman v. Callahan*, 66 Mo. 299; *Fulkerson v. Thornton*, 68 Mo. 468.

The judgment should be affirmed. All concur.

PATTERSON et al., Plaintiffs in Error, v. STEPHENSON.

Successive Attachments: PRIORITY OF WRITS. Successive writs of attachment in the hands of different officers may be levied on the same goods, and in the distribution of the proceeds will be entitled to priority in the order in which the levies are made. The possession of the officer making the first levy is not to be disturbed, but the subsequent levies are to be made by notifying him and by making return of the levies upon the respective writs. Every levy so made will hold the surplus of the proceeds left after satisfying all older levies.

Error to Daviess Circuit Court.—HON. S. A. RICHARDSON,
Judge.

REVERSED.

Joshua F. Hicklin for plaintiffs in error.

Plaintiffs in error did all they could to acquire and retain a lien on the goods. By their superior diligence, they found and got them before Bailey, Wood & Co. They could not have sued in justice's court, and thereby got their writ in the hands of the constable that first took goods in his possession by virtue of writs first issued by justice. The goods could not have been taken by sheriff from constable, nor could the constable have been garnished. R. S. 1879, § 2519.

The sheriff performed every act in reference to the goods that the constable did, in the way of a levy.

Section 447, Revised Statutes, permits and invites equitable interference on the part of the circuit court in this case. The controversy should, under said section, have been determined "as right and justice required," and not upon the theory of defendants in error, to-wit: That none but the constable, he being first in possession, could make a valid levy, for the reason that the same chattel is not susceptible of a seizure and possession by different officers at the same time. This statute shows on its face, by

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referring to different courts of co-ordinate jurisdiction and courts of general and limited jurisdiction, that different officers may have a valid seizure of the same property at the same time. If but one officer can have a levy of the same chattels at the same time, then the manifest intent of the legislature is defeated.

The constable's possession of the goods by virtue of former writs could not be interfered with by the sheriff, but the latter's acts operated as a valid attachment of the remainder of the goods after former attachers were satisfied, to the exclusion of those who came afterward. *Dunlop v. Patterson F. Ins. Co.*, 6 Reporter 374; s. c., 30 Am. Rep. 283.

Wm. M. Rush, Jr., for Bailey, Wood & Co.

When goods and chattels are seized by one official under a writ from a court having jurisdiction of the cause, they are in the custody of the law until the proper time for their sale, and during this time are beyond the reach of seizure by another writ in the hands of another officer. Crocker on Sheriffs, 205, § 449; *Metzner v. Graham*, 57 Mo. 404; *Freeman v. Howe*, 24 How. 450; *Taylor v. Carryl*, 20 How. 583; s. c., 24 Pa. St. 259; *Hagan v. Lucas*, 10 Pet. 400; *Buck v. Colbath*, 3 Wall. 334; *Ship Robert Fulton*, 1 Paine 620; *Ship Oliver Jordon*, 2 Curtis 414; *Harris v. Dennie*, 3 Pet. 292; *Drake on Attach.*, § 251. *Bruce v. Vogel*, 38 Mo. 106, was a case of levy upon real estate, of which only constructive possession is taken. If the goods were inaccessible, the party must be summoned as a garnishee. Sub. 4, § 420, R. S. The constable having obtained legal possession of the goods could not be ousted—they were in *custodia legis*, and no act of the sheriff could affect them.

J. W. Alexander and Gillihan & Brosius for the other defendants in error.

PHILIPS, C.—This is a contest among successive attaching creditors as to the order in which the proceeds of the attached property in the officers' hands shall be distributed. The record is somewhat confused, but enough is shown to indicate that a constable in Daviess county had seized, under a writ of attachment from a justice of the peace, the stock of goods of one James Stephenson. Afterward the plaintiffs in error, Patterson and others, brought suit in the circuit court of said county against said Stephenson, and sued out a writ of attachment, which on the 28th day of November, 1877, the sheriff undertook to execute on the same goods. When he arrived at the store he found the said constable in possession of the storehouse and goods, presumably under the writ of attachment from the justice's court. The constable, without yielding his possession, in conjunction with the sheriff, proceeded on the said 28th day of November, to invoice said goods, each presenting a list. "Both constable and sheriff, not knowing the legal effect of their acts, intended that the sheriff's acts should be and operate as a levy upon the goods, subject to the levy of the constable, if such acts amounted to a legal levy." The constable maintained his possession of the goods and refused to recognize any other act of the sheriff in reference to them. Afterward it appears that Bailey, Wood & Co., and other creditors, instituted separate suits in a justice's court of said county by attachment against said Stephenson, and writs of attachment were levied by said constable on said goods while he held them, with full knowledge on the part of these attaching creditors of the prior acts of said constable and sheriff. The creditors in the justice's court obtained judgment in their suits, and under an order of said justice of the peace the goods were sold by the constable for about \$1,200, of which sum about \$800 were left in the constable's hands, when plaintiffs in error obtained an interlocutory judgment in their action in the circuit court; all the cases in

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the justice's court having in the meantime been transferred to said circuit court pursuant to the provisions of section 50, chapter 11, page 191, Wagner's Statutes.

Afterward, on the 14th day of February, 1878, the plaintiffs, Patterson and others, filed in the circuit court aforesaid a motion setting out, in substance, the facts aforesaid, asking for an order, the effect of which was that after satisfying the attachment liens prior to the date of plaintiffs' levy, to apply the remaining funds in the constable's hands first to the satisfaction of the plaintiffs' debt. In support of this motion the plaintiffs made proof of the facts aforesaid. The court overruled this motion and plaintiffs excepted. Afterward, on the same day, Bailey and others, attaching creditors in said justice's court, filed their motion in said circuit court for an order on said constable to pay over the proceeds of said goods "in the same order as the original writs of attachment against said Stephenson came into his hands and were levied by him." This motion the court sustained, and the plaintiffs in error excepted, and bring the case here on writ of error.

There is no question under the present state of adjudications, but that the court which first acquires jurisdiction of the subject matter of litigation cannot be ousted of that jurisdiction by any subsequent proceedings instituted in any other jurisdiction. Equally true and well settled is it that an officer, who, under competent process, first seizes property, can hold that property against and to the exclusion of every other officer coming with a writ from whatever quarter, until the satisfaction of the debt for which he seized it, or the process is re-called. *Metzner v. Graham*, 57 Mo. 405; *Taylor v. Carryl*, 20 How. (U. S.) 583, 594; *Drake on Attach.*, (5 Ed.) § 267; *Freeman v. Howe*, 24 How. (U. S.) 450. And where an officer holds property under a writ of execution or attachment, and a subsequent like writ comes into his hands, he cannot seize and sell such property under the junior writ. He would be liable to the senior execution or attaching creditor for

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the value of the property disposed of under the junior process, as in case of positive disobedience of the first mandate, or as for a conversion. *Metzner v. Graham, supra.*

The counsel for defendants in error contends with much plausibility, that when the plaintiffs sued out their writ, the property being *pro forma* in the constable's hands under an antecedent writ, was already in *custodia legis*, and, therefore, the sheriff could not legally execute his writ on this property. This argument rests on the postulate that the execution of the writ of attachment is an actual seizure—a caption of the property; and, therefore, another jurisdiction and another officer cannot interfere, by a second writ, without disturbing the prior custody and possibly breaking the peace and producing conflict, confusion and disorder.

The strict logic of this rule would enforce the conclusion that when one officer under a competent writ has seized the property, it is, until the satisfaction of the debt for which the seizure was made, actually withdrawn from the operation of any subsequent writ, even in the hands of the same officer. Literally adhered to, there could be no qualified, simulated or equivalent execution of a second writ. And yet text writers and courts, singularly enough, while denying the right of the imposition of a second writ of attachment from another court by another officer on the property already attached, hold, nevertheless, that the officer first attaching may lay any number of succeeding writs on the property already seized by him, and after satisfying the first writ may apply any residue of the attached property to the remaining debts in their order; and it is also held that separate writs from different jurisdictions may simultaneously be levied on the same property by different officers, so that neither will acquire a priority, but a joint custody. *Drake on Attach.*, §§ 263, 265, 269, and authorities cited.

On principle and reason the validity of successive levies by the same officers on the same property is a recog-

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dition of the practical fact that there may be, after a taking into the custody of the law the property of the debtor, an effectual imposition of another writ without an actual caption, or a taking away of the property or an appropriation of it for the time being to the attaching creditor's claim. It is held in such case that the second writ in the hands of the same officer is executed by him, *sub modo*, so "it will be available to hold the surplus after satisfying the previous attachment, or the whole if that (the first) attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient. So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee." Drake on Attach., § 269. In *Tomlinson v. Collins*, 20 Conn. 364, it is held in such case that the second attachment is valid even without any notice to the bailee.

Evidently the making of a second levy by the same officer is recognized because it does not disturb his custody of the property. If the rule which prevents one officer from levying on goods seized by another officer, rests mainly on the prevention of conflict of jurisdiction and the interference of one officer with the prior custodianship of another, then, on the maxim *cessante ratione legis, cessat ipsa lex*, I can see no reason for the operation or recognition of the rule, where the second levy does not produce such conflict or interference. For it must be borne in mind that the other requirement of the law, that the levying of an attachment is an actual seizure of the property, is satisfied in the case of successive levies by the same officer, by a constructive application of the succeeding writ "to the surplus after satisfying the previous attachment." Why, then, was not the act of the sheriff in the case now under consideration, in taking the invoice of the goods in connection with the constable, "available to hold the sur-

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plus after satisfying the previous attachment," made by the constable? The constable had the requisite notice. It in nowise interfered with the prior custody. It produced no conflict, and would lead to no confusion.

In *Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 245; s. c., 30 Am. Rep. 283, the court held, after a careful review of the authorities, that money deposited with an officer of the court as special costs, was subject to attachment. This money was in the custody of the law, and held by an officer different from him who came with the writ of attachment. While conceding the fact that the sheriff, under his attachment writ, had no right to remove the property from its custodian, or to meddle with it, yet the court held as this legal custody was only for a limited purpose, and the residuary interest therein, after the object for which it was held should be served, would revert to the debtor, it was, therefore, an assignable interest, and if assignable by the debtor, it was an interest attachable, or one which the law, by its process, would assign to the attaching creditor. Folger, J., (p. 148.) says: "There was power to grant an attachment against the property of the appellant. The money in the hands of the clerk, or a residuary interest in it, was such property. The fund itself could not be taken away from him. It was the right to have from him, after the litigation was ended, the whole or a residue of that money, which was such property. That right was not in the custody of the clerk, so that he could ever retain it, or, of right, pass it to another. An attachment *
*, levied upon that, took nothing out of the custody of the clerk, nor meddled with anything in his hands. It seized upon an intangible right by means of the order of the court, and notice to the clerk. Such process and such action upon it made no conflict of jurisdiction between the two courts. The city court held the money, with a conceded right. The officer of the supreme court held the right (under the attachment) to receive it, or some of it, from the clerk, when the city court should see fit to declare

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the purpose fully served for which it took it into custody."

It seems from the reading of some of the reported cases that courts have felt the injustice of the rule invoked by the defendants in error in this case, and have sought in some instances to temper it by the supervision of the equity side of the court. The case at bar is a striking illustration of the harshness of the rule. The law recognizes a race of diligence among creditors, and its rewards, as expressed in the maxim, *vigilantibus non dormientibus jura subveniunt*. *Bruce v. Vogel*, 38 Mo. 100.

Because the claim of the plaintiffs in error was beyond the jurisdiction of the justice's court, they were compelled, by the law, to sue in the circuit court. The sheriff must not touch the goods under this writ, because the constable perchance has seized \$1,200 in value on debts of \$300, but other creditors with claims of \$50 and \$100 being within the justice's jurisdiction, can subsequently sue out writs and cut out the process of the superior court, prior in time. In other words, no writ from the circuit court can avail so long as any claim cognizable in the inferior court coming at any day, however slothful, is unsatisfied. This is not equality of right. Such law is not justice. And it is not improbable in the condition of the law touching this question, that the legislature of this State in 1855, enacted the following as a new section to the attachment act: "Where property is attached in several actions, by different plaintiffs, against the same defendant, the court may settle and determine all controversies in relation to the property, and the priority, validity, good faith, force and effect of the different attachments, which may arise between any of the plaintiffs, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require. If the writs issued from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court out of which the first writ of attachment was issued; in order whereto, the cases originating

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in the other court shall be transferred to it, and shall thenceforth be there heard, tried and determined in all their parts, as if they had been instituted therein. If any such controversy arise between a plaintiff in an action instituted in a court of general jurisdiction, and a plaintiff in an action instituted in a court of limited jurisdiction, the matter shall be determined by the former court, to which the action commenced in the latter shall be transferred. And when the defendant has been notified by publication, and does not appear, any plaintiff, in the circumstances contemplated in this section, may make any defense to any previous attachment, or to the action, which the defendant might; but no judgment on any issue made in such manner shall be binding on the defendant personally, or bar the plaintiff in the action so contested by an opposing plaintiff from again suing the defendant on the same cause of action."

This section was carried forward into subsequent revisions of the statute. Gen. St. 1865, § 50, ch. 141; R. S. 1879, § 447.

It is manifest from this section that the legislature contemplated not only that the same property might be "attached in several actions by different plaintiffs against the same defendant" under process from the same court; and "from different courts of co-ordinate jurisdiction," and that it might be likewise attached "in an action instituted in a court of general jurisdiction," and "in an action instituted in a court of limited jurisdiction." In the latter case the whole controversy between such successive attaching creditors is to be transferred to the court of general jurisdiction to "make such order in the premises as right and justice may require."

The record in this case shows that the constable and sheriff, when they met in the store-house, acted intelligently and conservatively, in the spirit of this statute. "Not knowing the legal effect of such acts, they intended that the sheriff's acts should be and operate as a levy

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upon the goods, subject to the levy of the constable, if such acts amounted to a legal levy." All the cases in the justice's court having been transferred under said statute to the circuit court, it was, in my opinion, the plain duty of the court to establish by its order the priority of the attachments, and direct the officers how and to whom to distribute the fund admitted to be in the constable's hands; and, in the absence of any ascertained fraud, to direct the distribution to be made in the order of the successive levies, including that from the circuit court.

In this view, the trial court erred in overruling plaintiffs' motion, and in sustaining that in favor of Bailey and others. Its judgment is, therefore, reversed and remanded with directions to proceed in said cause in conformity to this opinion. All concur.

THE STATE, *Appellant*, v. FINDLEY.

An Indictment for Selling Liquor, unlawfully, charged the selling to have been done "on or about the months of January, February and March." *Held*, that it was not open to the objection that it charged several offenses in one count, time not being of the essence of the offense.

Appeal from Howell Circuit Court.—HON. J. R. WOODSIDE,
Judge.

REVERSED.

D. H. McIntyre, Attorney General, for the State.

Livingston & Green for respondent.

NORTON, J.—At the April term, 1879, of the Howell county circuit court defendant was indicted for selling intoxicating liquors as a druggist in less quantities than one gallon.

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The indictment charges the selling to have been done "on or about the months of January, February and March, 1879." To this indictment a demurrer was interposed by defendant, which was sustained, and from this action of the court the State has appealed. The only objection presented by the demurrer is, that the indictment charged several offenses in one count, in this, that it charged the selling to have been done on or about the months of January, February and March.

Under the rulings of this court in the cases of *Storrs v. State*, 3 Mo. 9; *State v. Fletcher*, 18 Mo. 425; *State v. Myers*, 20 Mo. 411; *State v. Fitzsimmons*, 30 Mo. 236, the point raised by the demurrer is not well taken, and the action of the court in sustaining it was erroneous. As time is not the essence of the offense, it is stated with sufficient certainty. Had the indictment charged the offense to have been committed on the first day of January, the State, on the trial, would have been permitted to show that it was committed on any other day than that alleged in the indictment, provided it was within twelve months before the indictment was found. R. S., § 1821; *State v. Magrath*, 19 Mo. 678; *State v. Stumbo*, 26 Mo. 306; *State v. Wilcoxon*, 38 Mo. 370. Judgment reversed and cause remanded, in which all concur.

EMERY V. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY, Appellant.

1. **Recoupment:** COUNTER-CLAIM: JUSTICE'S COURTS. In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages are not as great as claimed by plaintiff. This is strictly a defensive recoupment and the justice has jurisdiction to entertain it, if he

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has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of the plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action, equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counter-claim, unless it has jurisdiction to entertain the cause of action, upon which the cross damages are claimed. If the real character of the cross demand is such that the justice could not entertain jurisdiction of it, if the defendants were suing upon it, then he certainly cannot entertain it, when asserted by a defendant before him, however close it may appear to be connected with plaintiff's cause of action. Neither can the true character of the cross demand be changed by the defendant declining to ask judgment for any possible excess in his favor.

2. — : — : CASE ADJUDGED. In an action before a justice of the peace upon an account for work and labor, the answer did not dispute the plaintiff's demand, but alleged damages to an engine, caused by plaintiff's negligence, in an amount exceeding the value of his services, and prayed that such damages to the extent of \$90 might be recouped from plaintiff's demand, which was for a like amount, and asked judgment for costs. Upon the trial it was proven that all plaintiff's labor was performed by him while working under defendant's bridge carpenter, with the exception of one night's work in watching an engine, to which he had been specially detailed by one of defendant's master mechanics with the consent of the carpenter and with the understanding that he was to receive therefor credit for one day's work, and during this night the injury to the engine occurred. The trial court allowed the defendant its claim in reduction of damages to the extent of \$50; a justice of the peace under the statute then in force, (2 Wag. Stat., p. 808, § 3,) having jurisdiction in cases of injury to personal property wherein the damages claimed did not exceed that sum. On appeal from this judgment, *Held*, that the injury to the engine was in no way connected with plaintiff's labor under the carpenter, and should not have been allowed in reduction of the value of his services beyond the value of the night's work upon the engine; that the defense set up should have been regarded as a cross action in tort for damages to personal property to the amount of \$90, and that, so regarded, it exceeded the jurisdiction of the justice, and ought to have been dismissed or ignored in both the lower courts. *Held*, also, that the allowance of the counter-claim was an error against plaintiff, only, the respondent in this court; and that defendant by urging and receiving the benefit of such claim to the extent of \$50 could not complain if it had lost the remainder by its own fault.

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Appeal from Lewis Circuit Court.—HON. JOHN C. ANDERSON,
Judge.

AFFIRMED.

Geo. F. Hatch and *Geo. W. Easley* for appellant.

Conceding that the code has no application to suits before justices of the peace, and that no affirmative relief can be sought in defenses of the character here set up, this case must still be reversed, for no affirmative relief was asked. No good reason can be assigned for saying to a defendant, you have sustained damages to a greater amount than your adversary sues you for, but he has sued you in a court that restricts you to defending beyond the sum of \$50, and notwithstanding you are willing to surrender your claim in excess of his demand, and ask nothing therefor, we will let you have the benefit of your damages proven to the amount of \$50, bar the remainder of your claim and give judgment against you. This would greatly multiply suits unnecessarily.

A. D. Lewis and *N. Rollins* for respondent.

The recoupment set up by defendant grows out of alleged injuries to personal property and exceeds \$50. 2 Wag. Stat., 808, § 3; *Webb v. Tweedie*, 30 Mo. 488; *Dillard v. St. L., K. C. & N. Ry Co.*, 58 Mo. 69; *Spencer v. Vance*, 57 Mo. 427.

MARTIN, C.—This was an action for work and labor, commenced before a justice of the peace of Lewis county in November, 1876. The statement of the plaintiff, after being amended by leave of court, was in the form of an account specifying the number of days for which he claimed wages at the rate of \$2 a day, and containing a credit for board, concluding with a balance in favor of plaintiff in the sum of \$90. The defendant filed an answer to the original

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statement, which, according to a recital in the justice's transcript, consisted of a counter-claim in part. This counter-claim was stricken out on motion of plaintiff's attorney, for the reason that it exceeded the jurisdiction of the justice. This original answer was withdrawn by leave of court, and permission given defendant to file an amended answer. A motion requiring defendant to re-file the original answer, was overruled. It is not included in the record of the case.

The amended answer consisted of two parts. In the first, the defendant denied that it was a corporation, or that it was liable to be sued as a corporation, or body corporate, or as an individual or person in law. In the second part of the answer the defendant pleads, that in the performance of the work and labor for which plaintiff sues, it was implied in the law, understood and agreed, that plaintiff should perform such labor with reasonable skill, care and diligence; that he failed to use reasonable skill, care and diligence, but on the contrary, performed said labor in such a careless, unskillful and negligent manner, that by reason of the said carelessness, unskillfulness and negligence, the engines, cars and tools of defendant, then in the keeping and under the control and management of plaintiff, suffered great loss, damage and injury in the sum of \$90, and in a greater amount than all the value of plaintiff's services. The answer concludes with a prayer that the sum of damages and injury sustained by defendant by reason of the said careless, unskillful and negligent services, acts and conduct of the plaintiff, be recouped and deducted from the sum claimed by plaintiff, and that defendant have judgment for costs.

It will be observed that there is no denial of the plaintiff's cause of action in the answer, either as to the fact of the labor rendered or its value. The plaintiff filed a motion to strike out this claim of recoupment, and it was sustained by the justice to the extent of reducing the counter demand to \$50. On trial before the justice a verdict

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was rendered in favor of plaintiff in the sum of \$34.50, from which an appeal was taken to the circuit court by defendant. The plaintiff in that court renewed his motion to strike out the second part of defendant's answer. This motion was overruled, and the case was tried by the court without the intervention of a jury. When the case came up for trial in the circuit court, the defendant admitted the plaintiff's account, as presented in his petition below, to be correct, and asserted the right to prove the matters set out in his answer, as holding the affirmative of the issues on trial.

From the evidence in the record, it appears that the plaintiff was a workman for defendant at Alexandria, under the charge of one Graham, a bridge carpenter for defendant; that in the month of September, 1876, one Gorham, a master mechanic, reported to Graham that he was ill and had no watchman for his engine that night, a construction engine he had been using; that Graham informed him that he had in his employ the plaintiff, who had at Canton and other places been a "hostler" of engines; the duty of such a person was to take charge of engines as soon as they arrived, take them to the round-house and to prepare them in readiness to go out again; that the plaintiff was hunted up and introduced to Gorham, who told him what he wanted done, telling him that there were three gauges of water in the engine, and not to move the engine at all, and to have it ready by five or six o'clock in the morning; that plaintiff was seen the next morning at six o'clock; that he seemed intoxicated; that the engine was badly smashed up, the pilot and front end torn off, and one flat car pretty badly broken; that it appeared the engine had been run into the cars, with such rapidity and force, that when the forward end of the engine ran under the car, the increased pressure on the trucks of the engine had bent both rails under them; that when asked how it happened, plaintiff remarked that he was pumping her up, and said that he supposed he would be discharged; that upon

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taking charge of it, the plaintiff was to have credit for the night's work as for a whole day, and that he received such credit; that there was no necessity for moving the engine, as far as witness knew.

A machinist by the name of Ambrose testified that the damage to the engine was at least \$100; that water is pumped into the boiler of some engines by running the engine forward and backward, on the track; into others by an injector; the defendant had four engines of the first class mentioned, and two of the latter class; that if the engine stopped at five o'clock in the afternoon with a hot fire in the furnace, and stood till five or six o'clock in the morning, with the fire left up, it might blow off steam so as to require pumping before using the next morning. No evidence was introduced by the plaintiff.

The defendant asked the court to declare that if, while the plaintiff was in the employ of defendant, and in charge of the engine, he, without authority, unnecessarily moved the engine on the track, and in so doing carelessly caused great damage to it, in an amount equal to the amount of plaintiff's wages, then the damage to the engine so occasioned by the carelessness or negligence of the plaintiff is the proper subject of recoupment in this case, and the verdict should be for defendant. This declaration of law was refused by the court. The case was taken under advisement and judgment was rendered for the plaintiff in the sum of \$38 and costs. The defendant saved its exceptions and brought this appeal.

It will be seen from this statement that the court, in its judgment, conceded to defendant the benefit of its claim in recoupment to the extent of \$50, and interest, and denied all advantage over that amount.

The counsel for defendant insist that the cross demand pleaded in their answer, was in the nature of a deduction or diminution of the plaintiff's claim of \$90 for labor, and that it should have been entertained and allowed by the court to its full extent, under the name of a defensive re-

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coupment. After considering the pleadings and evidence, I am unable to accept this view of the case.

The nature of recoupment and counter-claim has received the attention of the Supreme Court of this State in a line of concurring decisions, and it is unnecessary to review the law on the subject, any farther than an intelligent application of well settled principles may require it. *Grand Lodge v. Knox*, 20 Mo. 433; *Jones v. Moore*, 42 Mo. 413; *McAdow v. Ross*, 53 Mo. 199; *Ritchie v. Hayward*, 71 Mo. 560. The term "recoupment" was anciently applied to the right of deduction from the damages claimed by plaintiff on account of part payment, depreciation or partial failure of consideration, or some analogous fact. 1 Dyer (2 b.); *Coulter's case*, 5 Co. 31; Sedgwick on Dam., 431; *Barber v. Chapin*, 28 Vt. 413; *Grand Lodge v. Knox*, 20 Mo. 433; 2 Par. Cont. 246; Waterman Offset, 468. This right in modern times has been recognized under the name of deduction or reduction of damages, (*Hecksher v. McCrea*, 24 Wend. 304,) which is probably the more proper name for it; while the meaning of recoupment has been greatly enlarged and changed. 2 Par. Cont. 246. Pomeroy Remedies, § 733. In modern times the term "recoupment" has been extended and applied to cross demands existing in favor of the defendant, and arising out of the same contract or transaction upon which the plaintiff founds his action.

After reviewing the old cases in *Grand Lodge v. Knox*, Judge Leonard remarks: "The American cases, however, at least in New York, Massachusetts, Alabama, and some few other states, now go the full length of declaring that all matters of counter-claim arising out of the same transaction, and not technically the subject of set-off, can be set-off by way of recoupment of damages, provided the plaintiff has been properly apprized of the defense." The courts differ in their views as to how the cross demand must arise from plaintiff's claim, or be connected with it. In some states a strict construction has been adopted, while

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in others a very liberal one prevails. *Carey v. Guillow*, 105 Mass. 18; *s. c.*, 7 Am. Rep. 494; *Chandler v. Childs*, 42 Mich. 128; *Ritchie v. Hayward*, 71 Mo. 560. The question in this case is not whether the defendant's supposed right of recoupment or counter-claim is so connected with the plaintiff's cause of action as to be properly asserted in this case; but granting its sufficient connection with the cause of action, is it a defensive recoupment going merely to the depreciation of the consideration of the contract sued on, or is it a well defined cause of action for an injury to personal property, laid along-side of the admitted value of the plaintiff's services with the object of overtopping it in amount?

The growing principle of recoupment was recognized by the legislatures of many of the states, including our own, and under the name of counter-claim it was so enlarged as to give the defendant the benefit of the difference between his cross demand and the plaintiff's claim, when the excess should prove to be in his favor. *Chandler v. Childs*, 42 Mich. 128. The counter-claim of our Practice Act includes everything which in modern times goes under the name of recoupment proper, as well as much more; for it extends to offsets and many cross actions not in any way connected with the plaintiff's demand. *Pomeroy Remedies*, § 736; *Flesh v. Christopher*, 11 Mo. App. 483; *Gordon v. Bruner*, 49 Mo. 570; *Conner v. Winton*, 7 Ind. 523; *Pattison v. Richards*, 22 Barb. 146. But no right of recoupment as understood in modern times, or counter-claim, can exist in the absence of a cause of action in favor of the defendant. A cross action is always implied in its terms. *Pomeroy Remedies*, § 733; *Carey v. Guillow*, 105 Mass. 18; *Clark v. Wildridge*, 5 Ind. 176; *Vassear v. Livingston*, 13 N. Y. 257; *White v. Reagan*, 32 Ark. 281. When it falls short of constituting a cause of action, it belongs to the class of partial defenses in reduction or mitigation of damages, and ought to go by the name of reduction of

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damages. Pomeroy Remedies § 733; *Moffet v. Sackett*, 18 N. Y. 522.

II. It is undoubtedly true that when the plaintiff sues for the price of labor the defendant is at liberty to recoup against his claim, any damages suffered through the negligence of the plaintiff whereby the value of the consideration was depreciated. *Eaton v. Woolly*, 28 Wis. 628; Pomeroy Remedies, § 732. It was in this class of cases, the modern use of the term recoupment was first recognized in England in a restricted sense. But in such cases it will be found that a valid cross action existed in favor of defendant, and in the use of it he was often confined to such damages as depreciated the value of the consideration.

Now it is clear to my mind that the injury complained of by defendant in this case, does not fall within the meaning of the term "recoupment" as anciently understood. It does not contain matter simply reducing the plaintiff's damages, or depreciating the consideration received by defendant for the promised wages. According to the plaintiff's account he was suing for 25½ days' labor in July, 23½ days in August, and four days in September. He was to receive a credit of one day's labor for the single night's work in watching the engine, for which he was specially detailed by Graham, the bridge carpenter. It does not appear satisfactorily that the night's labor in watching the engine was included in his account as one of the four days in September. But granting that one of the last four days in the account included this night's work, it is clear that all the balance of his demand is for labor rendered by him, while a laborer under Graham, the bridge carpenter. The defendant had received the full benefit of all his labor, before the plaintiff was specially detailed as a "hostler" to take care of the engine. The injury to the engine was in no way connected with the balance of this labor. No negligence can be imputed to him in respect to it, and the injury to the engine cannot in any fair sense of its connection with his services, be accepted in reduction or depre-

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ciation of the value of his labor while helping the bridge carpenter. As a depreciation of the consideration, for which he sues in this case, it could not extend beyond the \$2 which he was to be paid for the night's work in watching the engine.

But the claim in recoupment is not asserted for this limited purpose. The defendant admits of record that the plaintiff is entitled to these \$2, if it is included in the account, as he unquestionably is to his labor under the bridge carpenter. The answer contains a well pleaded cause of action for injury to personal property, by reason of the negligence of the plaintiff. Whether you call this "recoupment" or counter-claim, it certainly is not in the nature of a defensive recoupment or counter-claim, in reduction of damages, by depreciating the value of the consideration received, or cutting down the damages claimed, because the services rendered were not as valuable as contracted to be. Whether the plaintiff sues for his wages or not, this cause of action exists in favor of defendant. It was a matter of choice with defendant, whether it should be prosecuted by being laid along-side of the plaintiff's claim for damages, or asserted in an independent action. In either case the effect would be the same.

I am unable to regard it in any other light than a cross action in favor of defendant to the extent of \$90, at least, for an injury to the defendant's engine. Holding the relation of employe to the defendant on the night of the injury, the law, and not the contract, imposed the duty to be careful in all that he did; negligence on his part was a violation of this duty, which resulted in an injury to the defendant's personal property, for which he is responsible in law to its full extent. It sounds in tort and is not in the nature of an action *ex contractu*, nor could it, as a cross claim, be measured by the consideration of the contract sued on by the plaintiff. Its true character cannot be escaped by pleading it in the form of an *assumpsit*, even though the defendant had attempted that. *Chandler v.*

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Childs, 42 Mich. 128; *Carey v. Guillow*, 105 Mass. 18. I regard the defendant in this case as seeking to avail himself of the benefit of a modern recoupment or counter-claim, on account of a well defined cause of action for injury to personal property.

If our Practice Act relating to counter-claims applies to actions before justices, then this claim of defendant for \$90, or more, for injury to the engine was clearly beyond the jurisdiction of the justice. It ought to have been dismissed or entirely ignored in both of the lower courts. The circuit court seems to have allowed it to the extent of \$50 and interest. This was an error against the plaintiff, but he is not a complainant in error here. The defendant has no right to complain. After the court, by refusal of defendant's instruction, had indicated that the claim for \$90 was beyond the jurisdiction governing such claims, the defendant ought to have dismissed it. By retaining it in court as pleaded, the defendant has received the benefit of one-half of it. If the other half is lost, it is his own fault. When cross demands are not within the jurisdiction of the court, the defendant is not entitled to the benefit of any part of them. *Almeida v. Sigerson*, 20 Mo. 497; *Reed v. Snodgrass*, 55 Mo. 180.

If the provisions in the Practice Act relating to counter-claims do not apply to practice before justices of the peace, which is probably true, (*Flesh v. Christopher*, 11 Mo. App. 483; R. S. 1879, § 3522,) and which seems to be conceded by defendant's counsel, then the defendant's counter-right must be supported, if at all, as a defensive recoupment, or mere right of reduction of damages. And as in the form in which it is pleaded and proved, it is clearly a cross action in favor of the defendant for an injury to personal property to the extent of \$90 at least, and not the mere right of reduction of damages by reason of a depreciation of the consideration received by defendant in the labor sued for, it cannot be entertained without in sub-

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stance entertaining a counter-claim sounding in tort, which is not authorized by law.

The conclusion I have reached may be briefly stated: In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort, arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages claimed are not as great as claimed by plaintiff. This is strictly a defensive recoupment, and the justice has jurisdiction to entertain it, if he has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action, equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counter-claim, unless it has jurisdiction to entertain the cause of action upon which the cross damages are claimed. If the real character of the cross demand is such that the justice could not entertain jurisdiction of it if the defendant were suing upon it, then he certainly cannot entertain it when asserted by a defendant before him, however close it may appear to be connected with plaintiff's cause of action. Neither can the true character of the cross demand be changed by the defendant declining to ask judgment for any possible excess in his favor.

The convenience and policy of having all cross demands settled in the same case, cannot justify the defendant in bringing a cross demand for settlement in a justice's court which has no jurisdiction of it, either because it sounds in tort, and exceeds the amount which limits the jurisdiction of a justice in such actions, or because no unliquidated counter-action can be entertained by a justice of the peace.

For these reasons, I am of the opinion that there is

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no error in this record which the defendant has any right to complain of. Accordingly, the other commissioners concurring, the judgment is affirmed.

HIGGINS v. AUSMUSS, *Appellant*.

1. **Special Taxes.** Personal property cannot be taken to pay a special tax for the improvement of real estate; and if it appear by the tax-book that the tax is for that purpose, the collector will be liable if he levies on personalty to enforce it.
2. **Alteration of Tax-Book.** A tax-book altered by the collector by the addition of an item of taxes not on it when the book came into his hands, is void as to that item, and will not protect him in enforcing its collection.

Appeal from Linn Circuit Court.—HON. G. D. BURGESS
Judge.

AFFIRMED.

E. R. Stephens for appellant.

Chas. L. Dobson for respondent.

NORTON, J.—This is an action in the nature of replevin, for claim and delivery of personal property, instituted before a justice of the peace of Linn county. Plaintiff obtained judgment before the justice, and also in the circuit court, to which the cause had been taken on defendant's appeal, and from the latter judgment defendant has appealed to this court, and assigns as the chief ground of error the action of the court in refusing instructions.

It appears from the record before us that defendant was the collector of the corporation of the city of Linneus, and was charged by an ordinance of said city with the duty of collecting all taxes placed in his hands for collection; that he gave plaintiff a receipt for railroad and city

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revenue tax assessed against him for the year 1877, the tax on personal property amounting to \$11, and on real estate to \$9.04, making a total of \$20.04. This receipt was produced in evidence by the plaintiff, and across one corner of it was written, "Balance due \$8.64 as special repair tax on streets." This tax plaintiff refused to pay on the ground that it was illegal, for the reason that he had never been notified to build or repair his sidewalk, and that the repairing claimed to have been done by defendant was without authority; on plaintiff's refusal to pay this tax, defendant levied upon two cook stoves, for the recovery of which this suit was brought. The tax-book was offered in evidence, which defendant testified had been placed in his hands for collection, and the only reference made to its contents in the bill of exceptions is that "it tended to show the balance and the note or memorandum made by the marshal and collector showing \$8.64 special assessed repair tax."

It is insisted that the court erred in refusing the following instructions:

1. That the collector of the city of Linneus is empowered to levy on, seize and sell personal property for the payment of taxes due and unpaid to the same for general or special purposes, and that if at the time the property was replevied by Higgins, the same was actually levied upon and seized by defendant as collector of said city for a balance of \$8.64, as shown by the entries in the city tax-book as taxes due the city, or shown by the return of the collector (the defendant), the finding should be for defendant.

2. That the charter and ordinances of the city being legal, and the tax-book emanating from the city council, its agents and servants, acting in pursuance of said charter and ordinances, and the tax-books being properly in the hands of the collector of the city for the enforcement of taxes due and unpaid the city, is sufficient to authorize him from the tax-book alone to enforce the payment of its

taxes by levy, seizure and sale of personal property for due and unpaid taxes, and the finding in this case should be for defendant.

There can be no question but that a tax-book emanating from proper authority, and placed in the hands of one authorized to collect the taxes therein contained when it came to his hands, would be a valid process and authorize the collector to levy upon property of a delinquent taxpayer to enforce payment, but when it appears, as we think it does in this case, that the special tax for the non-payment of which the stoves in question were levied upon, was for street or sidewalk improvements in front or opposite defendant's real estate, it did not confer upon the collector any authority to levy upon defendant's personal property, it having been held by this court in the case of *City of St. Louis v. Allen*, 53 Mo. 44, that such a special tax or assessment can only be enforced against the said real estate, and that a personal judgment for such tax against the owner is null and void, and statutes authorizing such judgments are unconstitutional. It was also so held in the case of *City of Louisiana v. Miller*, 66 Mo. 467.

Besides this, it appears from the record before us that the special tax was placed on the tax-book by defendant without authority, and the tax-book, so far as it related to the tax thus inserted in it, was void as a process or warrant, and conferred no authority on the collector to levy upon the stoves in question. In the case of *Henry v. Bell*, 75 Mo. 194, where a kindred question was involved in a replevin suit to recover a mare which had been levied upon by a collector, the owner thereof having refused to pay certain special township taxes demanded of him, it was observed, "that if the special tax had appeared upon the tax-books as originally made out and delivered to the collector, it would have been a valid process and a complete defense to the action; but the unauthorized alteration of the process after it came to his hands by the addition of the special tax * * * deprived it of all semblance

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of authority, if any it had, so far as this special tax is concerned, and to that extent it was utterly void and affords no defense to the action."

Under either of the above views the instructions asked were properly refused, and the judgment is hereby affirmed. All concur.

KOCH V. THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*,
Plaintiffs in Error.

Nunc pro tunc Judgments: VALIDITY AS AGAINST STRANGERS: SURETIES IN APPEAL BOND. In order that a *nunc pro tunc* entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry made and an opportunity to appeal therefrom.

Appeal from Osage Circuit Court.—HON. A. J. SEAY, Judge.

REVERSED.

Smith & Krauthoff for plaintiff in error.

Belch & Silver for defendant in error.

HOUGH, C. J.—On the 28th day of April, 1875, the plaintiff's intestate recovered judgment in the Osage circuit court against the Atlantic & Pacific Railroad Company, for killing stock, and judgment was entered against said company for \$50. From this judgment an appeal was taken to this court, and said judgment for \$50 was, at the April term, 1877, affirmed. The defendant Bonnot was a surety on the appeal bond executed by the railroad company in said cause. After the affirmance of said judgment by this court, and at the October term, 1877, of the Osage

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circuit court, a judgment *nunc pro tunc* was entered for the sum of \$100, on the ground, recited in said judgment, that a motion for double damages had been filed by the plaintiff and sustained by the court after the verdict in said cause at said April term, 1875, and that the clerk had omitted to enter judgment accordingly. On the 22nd day of March, 1878, the present suit was instituted against the railroad company and said Bonnot on said appeal bond, and judgment was rendered against the defendants for the full amount of the *nunc pro tunc* judgment, and they have appealed to this court.

As between the parties to a judgment in the circuit court, there is no period fixed by statute within which entries *nunc pro tunc* must be made. It is settled that such entries cannot be made to the prejudice of third parties. *McClannahan v. Smith*, 76 Mo. 428. In some cases it may be that such entries should not be allowed after an affirmation by this court of the judgment of the circuit court, as entered by the clerk, thereby giving the party obtaining the judgment in the trial court the benefit of the affirmation of a judgment which was not brought to the attention of this court. It might be that if the judgment really rendered had appeared in the record, the judgment of this court would have been different. These questions, however, are properly determinable on appeal from the order of the court allowing the *nunc pro tunc* entry.

Where it appears, however, as in the present case, that a stranger to the original judgment is sought to be affected by the *nunc pro tunc* entry, in order to bind such party, it must also appear that he had notice of the judgment really rendered by the court at the time his rights were acquired or his liability was fixed thereunder, or that he had notice of the application to have such judgment entered, and an opportunity to appeal. And when such entry may properly be made after a cause has been finally disposed of by this court, notice to the opposite party to the suit as well as to all parties interested, is certainly essential to its valid-

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ity. No such notice appears in this record, and without inquiring into the sufficiency of the recitals on which the *nunc pro tunc* entry was based, the judgment will be reversed and the cause remanded. All concur.

STONE *et al.* Appellants, v. SPENCER.

1. **Fraudulent Conveyances.** If a debtor sells his goods in order to defraud his creditors, and the vendee purchases in order to aid in the perpetration of the fraud, the sale is void as against creditors, no matter what price was paid, or how early after the sale possession was taken, or how notorious the change of possession.
2. ——— : **ATTACHMENT : EXEMPTION : BURDEN OF PROOF.** Where the right of an attaching creditor is contested by a transferee of the debtor on the ground that the goods in controversy were exempt from attachment in the hands of the debtor ; *Held*, that the burden of proving such exemption was on the transferee.
3. **Newly Discovered Evidence**, on which a motion for a new trial was based in this case ; *Held*, cumulative and trivial.
4. **Practice : INSTRUCTIONS.** Where a case is tried by the court below without a jury, this court cannot say that a declaration by the trial court that upon the pleadings and the evidence the plaintiff was not entitled to recover, was error, without holding that the finding and judgment were not warranted by the law and the evidence.

Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB,
Judge.

AFFIRMED.

R. S. Musser for appellants.

Judson & Motter for respondent.

HENRY, J.—Plaintiffs, husband and wife, sued Spencer in the circuit court of Buchanan county for the recovery of the following specific personal property, viz : one cream-colored mare, one top side-spring buggy and one set of

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harness. The defendant's answer was a denial that plaintiffs owned or were entitled to the possession of the property, and on a trial he obtained a judgment, from which plaintiffs have appealed

Tele Stone, the wife, testified that she purchased the property from Isaac Samuels at her husband's store in St. Joseph on Saturday afternoon, September 14th, 1878, and paid the purchase money and received his bill of sale for the property the same afternoon; that the price paid was \$350, and that the property was worth that sum; that she did not make the purchase with the intent to aid Samuels in defrauding his creditors; that the purchase was made in the store, and that he went back to the desk, where her husband was, to get his money; that she did not see it paid; that on Monday morning, September 16th, she and Samuels went to the livery stable where Samuels kept the mare to get her, but the proprietor was absent, and that she returned again alone about nine o'clock a. m. and saw one Fleming, who was managing the stable, showed him her bill of sale, and told him she wanted to take the mare to another stable, but finally agreed with him on terms for boarding the mare, and left the mare, harness and buggy. Plaintiffs also offered in evidence the proceedings in an attachment suit wherein A. Walter & Co. were plaintiffs, and Samuels was defendant, and the levy made by the sheriff of said county, defendant herein, on said property, at five o'clock p. m. on the 16th day of September, 1878. Fleming testified to the same facts stated by Mrs. Stone in relation to her visit to the stable and what occurred between them.

Defendant introduced Winslow Judson, who testified that on the day the attachment was levied Samuels came to his office to see about the claim of A. Walter & Co., which he had for collection; said he was unable to pay, was going west, and asked witness if he should make a bill of sale of his horse and buggy to some friend if his creditors could then touch them. Witness told him he

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had no right to ask him that question; that he should consult his attorney; that he knew he had a claim against him for collection. That, within two hours after this conversation witness inquired of the foreman in charge of the stable where the mare was kept, and was told by him that she was still there in Samuels' name. Spencer testified that he had other attachments against Samuels, under which he had attached all his stock in trade in his jewelry store, in St. Joseph, on the 16th day of September, at 2:20 o'clock p. m.; that Samuels was insolvent.

The cause was tried by the court without the intervention of a jury.

Plaintiffs asked the following instructions, which were given:

1. A sale of property made on Saturday, the seventh day of the week, by and between Jews adherent to the Jewish religion, is not in violation of the laws of the State of Missouri, and is not, therefore, null and void.

2. There can be no fraud committed by a debtor as against his creditors in the disposition of property not subject to execution and attachment.

4. A sale made by a vendor of goods and chattels in his possession or under his control, and where the same is accompanied by delivery in a reasonable time, regard being had to the situation of the property, and followed by actual and continued change of possession of the property sold, is valid as against the creditors of the vendor.

5. If the court, sitting as a jury, believe from the evidence that the taking possession of the property in controversy by the female plaintiff was open, notorious and unequivocal, such as to apprise the community and parties in charge of the property that the property had changed hands, and that the title had passed out of the seller into the purchaser, plaintiffs are allowed to recover judgment.

The following asked by the plaintiffs were refused:

3. A party attacking a sale for fraud as against creditors must show that the property sold and attached as the

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property of the debtor (the vendor) was properly subject to execution and attachment, and also that the grounds set forth in the affidavit for attachment are true.

6. Under the pleadings and evidence plaintiffs are entitled to recover.

The following declaration of law was made by the court at defendant's request: The court sitting as a jury declares the law to be, that defendant, upon the pleadings and evidence herein, is entitled to recover from plaintiffs and their sureties, upon their bond given herein under the provisions of section 3, chapter 166 of the General Statutes of Missouri, the value of the property taken out of his possession herein, with his damages and costs in this behalf sustained.

The four instructions given for plaintiffs were more favorable to plaintiffs than they were entitled to. The fourth and fifth might each have been objected to by defendant. They both recognize the erroneous doctrine that if a valuable consideration is paid for the goods by the purchaser, and he takes possession of them in a reasonable time, regard being had to their situation, and such possession is of a character to apprise the community of a change of ownership, the sale is necessarily good against creditors. They ignore a question involved in this case on which evidence was adduced, viz: the participation of the purchasers in the fraud intended against creditors by the vendor. No matter what price was paid, or how early after the sale possession was taken, or how notorious such change of possession, if the vendor sold in order to defraud his creditors, and the vendee purchased in order to aid him in the perpetration of such fraud, the sale is no more valid against such creditors than if no consideration passed between them.

The instruction refused, No. three, was properly refused. It is not the case of a levy by the sheriff upon

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2 ———. attach- goods of defendant, of which the defendant
ment: exemp- in the execution or attachment claims an
tion: burden of exemption, but it is a claim set up by a third
proof. party, who bases his right of property upon such exemp-
tion, and the court correctly held that in such cases the
burden of proof was on such party.

The sixth refused was also properly refused, because there was ample evidence to warrant a verdict for defendant. Judson's testimony shows that Samuels intended a fraud, and Mrs. Stone testifies that Samuels was her son-in-law, and that she knew he was having some trouble in his money matters, but she says it was not her business to understand his money matters. The sale was made Saturday in the afternoon. No person present witnessed the sale. A bill of sale was taken by her. Early Monday morning she and Samuels went to the stable where Samuels kept the mare to have a formal delivery of the property, and she was not satisfied until the livery keeper agreed to keep the mare for her. These precautions to keep down suspicion, so far from effecting the object in view, lead to the conclusion that, aware of the insolvent condition of Samuels, his mother-in-law and he were endeavoring to make evidence to sustain the *bona fides* of a sale that was in fact fraudulent and void.

The newly discovered evidence on which a motion for new trial was based, was cumulative and trivial. Joseph Farrell would have testified that on Sunday, the day after the sale, Samuels went to the stable and told him and others that he had sold the property to his mother-in-law. Nison Stone would have testified that at his wife's request, he paid Samuels \$350 for the property; that he was in attendance until noon the day the cause was tried, and that in the afternoon he was sick and unable to leave his bed. And Samuels would have testified that the property was exempt from execution or attachment. The fact, if true, that the property was exempt from attachment, could equally as well have been

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proved by other witnesses. Whether the mare was exempt or not, depended upon what other horses he possessed, and the other property was not exempt except at the election of Samuels to take it in lieu of property specifically exempt, and it is not alleged that no other witness was present, or could have been procured to prove the facts upon which such exemption depended. If Nison Stone's testimony was regarded as important, knowing that he would so testify, it was the duty of plaintiff to apply for a continuance if he was so sick that he could not attend and testify. It is not even alleged that when in attendance he was there to testify. Farrell's testimony could not have possibly varied the verdict; and it is strange that no other effort was made at the stable to ascertain such facts in the knowledge of the proprietors and employes, as would have tended to show the *bona fides* of the sale.

The declaration of law made by the court at defendant's instance, is complained of. If the issues of fact had been tried by a jury the instruction would have been erroneous in taking the case from them by the court, but the issues of fact were submitted to the court, and the instruction announced no more than the verdict found, and cannot be said either to have misled the court or to have withdrawn from its consideration any testimony adduced on the trial. If the law and the evidence warranted the verdict, then this instruction simply declared that the court should do what it ought to have done without any such declaration of its duty. The declaration does not indicate that the court applied any erroneous principle of law to the case. The instructions given for plaintiffs show the theory of the law upon which the court proceeded. "Where the case is submitted to the court for hearing, declarations of law are generally of but little use, except to show the theory on which the case was tried." *Cooper v. Ord*, 60 Mo. 431.

All concurring, the judgment is affirmed.

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KRONSKI V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Justices' Courts: COMPLAINT: RAILROADS: DAMAGE TO CATTLE.** A complaint in a justice's court alleged that plaintiff's cow was killed by a railroad company at a point on its road where by law it was bound to maintain a sufficient fence, and that the company had failed and neglected to maintain such fence at the point where the cow got upon the track and was killed. *Held*, that after verdict these allegations would be deemed to aver sufficiently that the killing was occasioned by the failure to fence.
2. ——— : ——— : **JEOFAILS.** Where the entire record showed that the plaintiff's cow was killed in the township of the justice before whom suit was brought under section 809, Revised Statutes 1879, the want of a specific allegation of this fact in the complaint was held to be cured by defendant's appearance in the circuit court and its participation in a trial upon the merits.
3. **Defective Service: WAIVER.** A defect in the service of a summons is waived by appearance and submission to the trial of the cause upon its merits, notwithstanding a motion to dismiss because of such defect be first made and overruled.
4. **Justices' Courts: JURISDICTION: PRIMA FACIE EVIDENCE.** Taking an appeal from a justice of the peace having in his possession the docket of the justice before whom the suit was brought, is *prima facie* evidence of a transfer of jurisdiction from the one justice to the other.
5. ——— : **MISNOMER: JUDGMENT.** Service of process in favor of the right party by a wrong name, is good, and a judgment in favor of the right party by his proper name will after trial cure a misnomer in the complaint, summons or prior proceedings.

Appeal from Lafayette Circuit Court.—HON. W. T. WOOD,
Judge.

AFFIRMED.

Thos. J. Portis and E. A. Andrews for appellant.

Under the statute a failure to fence its road does not create an absolute liability against a railroad company. It is only where such failure to fence has occasioned or caused the damage. This fact is jurisdictional. It must be alleged

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in the complaint, and there must be some evidence tending to prove it. *Curry v. R'y Co.*, 43 Wis. 665; *Lawrence v. R'y Co.*, 42 Wis. 322. The return of the constable did not give the court jurisdiction over the defendant. *Lake Shore & M. S. R'y Co. v. Hunt*, 39 Mich. 469. The records of the county court, or at least the justice's commission, was the only evidence to show a transfer of jurisdiction. Kronski and Krinshee are not *idem sonans*, and defendant appealed from a judgment in favor of the former in a case where the justice's transcript does not show any jurisdiction to render such a judgment, and the suit should have been dismissed in the circuit court upon defendant's motion. *Robson v. Thomas*, 55 Mo. 581; *State v. Hardy*, 21 Mo. 498; *Cato v. Hutson*, 7 Mo. 142; *State v. Curran*, 18 Mo. 320.

Rathbun & Shewalter for respondent.

WINSLOW, C.—This is an action for damages under the 43rd section of the Corporation Act, for killing plaintiff's cow, valued in the complaint at \$40. The complaint was originally filed before James W. Callahan, a justice of the peace of Lafayette county, October 25th, 1878, and the plaintiff is therein styled Martin Krinshee; and, in the summons, which was issued by Callahan, the plaintiff is also called Martin Krinshee; in all of the other pleadings and records in the case, including those filed by the defendant, he is designated as Martin Kronski. Appellant made this variance a ground for a motion to dismiss the suit in the circuit court, but did not otherwise raise it, and now insists on it for error in this court. At the August election, 1878, Franklin K. Tutt was elected as the successor of Callahan, and became the custodian of his docket; and the transcripts were made out and returned by him; in fact, all the proceedings were conducted before him, after the issuance and return of the summons. Judgment by default was rendered against defendant by the justice, from which it appealed to the circuit court.

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The complaint in the case is as follows: Plaintiff states that defendant is an incorporated company under the laws of this State, and that on the 2nd day of October, 1878, at Lexington township, in Lafayette county, at a point on the track of defendant's railroad in said township, where the same passed along and adjoining inclosed and cultivated fields and uninclosed lands, and not at a public or private crossing of said road, the defendant, by its agents and servants running its locomotive and train of cars, ran the same upon and over a milk cow, property of plaintiff, of the value of \$40, and thereby killed said cow; that defendant had failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where said cow got upon the track of said road and was killed, and that by reason of said killing and by virtue of the 43rd section of chapter 63 of General Statutes of Missouri, and as amended by laws of 1877, as per Meyer's supplement, page 74, section 43. Wherefore plaintiff asks judgment for said sum of \$40, the value of said cow, and that upon final judgment the same be doubled as provided by statute.

The summons is in the usual form, and no complaint is made of it. The return of the constable is as follows:

"Executed the within writ on the within named Missouri Pacific Railway Company, by reading the same to C. Ben. Russell, agent for said company, in the office of said company, on the 25th day of October, 1878, in Lexington township, Lafayette county, Missouri."

In the circuit court defendant filed a motion to dismiss the suit, pending which plaintiff procured an order on the justice to file an amended return, which was filed; and, thereupon, the motion to dismiss was overruled. The amended transcript was intended to show the succession of Tutt to the docket of Callahan, and contained nothing additional. The following is the motion:

"Now comes the defendant by its attorney, appearing specially and for this purpose only, and objects to the

jurisdiction of this court in this cause, and moves the court to dismiss this suit for the following reasons: (1) Because the justice of the peace did not have, nor has this court, jurisdiction of defendant. (2) Because the justice of the peace before whom this cause was tried, did not have, nor has this court, jurisdiction of the subject matter of this suit. (4) Because neither the transcript nor the record of the justice of the peace before whom this cause was tried, shows that plaintiff's animal was injured within the township of which he was a justice of the peace. (4) Because the complaint filed before J. M. Callahan, J. P., was made by one Martin Krinshec, and the transcript of the judgment rendered before F. K. Tutt, J. P., shows that the judgment was in favor of Martin Kronski. (5) Because the transcript herein does not show how the jurisdiction of a cause pending before one J. M. Callahan, J. P., was transferred to one F. K. Tutt, J. P., or Frank K. Tutt, J. P."

The amended transcript filed by the justice under the order of the court contained this statement as to the succession, which was all the evidence on the subject, except the fact that Tutt had possession of the docket of Callahan, finished the case, and made the return of the transcript to the circuit court: "November 8th, 1878. At the general election held on the 5th day of November, 1878, the undersigned was duly elected justice of the peace for Lexington township, Lafayette county, Missouri, and having duly qualified as such, the docket of James M. Callahan, with the above cause, was turned over to me as his (James M. Callahan's) successor in office."

A trial upon the merits was then had before the court without a jury. The plaintiff, to sustain the issues on his part, offered evidence tending to prove all the material allegations of the petition; no evidence was offered on the part of defendant. The court thereupon found the issues for the plaintiff, assessed his damages at \$30, and rendered a judgment in his favor for \$60.

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The record of the judgment rendered in the circuit court recites the appearance of the parties thus: "Now, at this day, come the parties aforesaid, by their attorneys, and this cause is now taken up and submitted to the court for trial, a jury being waived," etc. Then follows a hearing on the merits, a finding for plaintiff, a motion to double the damages, and the recital that "the defendant, by her attorney, thereupon filed her objections to the damages being doubled, which said objections are now submitted to the court, and being seen and fully heard, the said objections are overruled." Then follows the judgment for double damages, to reverse which, the defendant has prosecuted this appeal.

Appellant maintains that the complaint is insufficient, because it fails to state that the injury was occasioned by the failure to erect and maintain the fences. The complaint alleges, "that the defendant had failed and neglected to erect or maintain good or sufficient fences on the sides of its road, at the point where said cow got upon the track of said road and was killed." The inference from this statement, in connection with the preceding allegations that the injury occurred at a point on the road where the defendant was bound to fence, is almost irresistible that the injury was occasioned by the failure to fence. Complaints under the same section of the statute containing similar allegations, some of them less perspicuous, have been held sufficient, after verdict, by several recent decisions of this court; and, under those cases, this one must be held good. *Edwards v. R. R. Co.*, 74 Mo. 117; *Bowen v. R. R. Co.*, 75 Mo. 426; *Belcher v. R. R. Co.*, 75 Mo. 514.

The second point insisted on by appellant is, that "the complaint does not allege that the animal was killed or injured in the justice's township." As to this point, nothing further is said by counsel than the declaration that "no argument upon this point is necessary." We gather from the record, however, that

1. JUSTICES' COURTS:
complaint: rail-
roads: damage to
cattle.

2. ———: ———:
jeofails.

the real objection is, that the complaint does not show that the justice was a justice of the township in which the animal was killed, but only a justice of the peace of the county. The complaint alleges that the injury occurred in Lexington township; the summons describes the justice as "a justice of the peace of Lexington township, in the county of Lafayette," and commands the defendant to appear before him as such; the summons was directed "to the constable of Lexington township," and is returned as served in that township; the judgment was rendered in that township; the amended transcript recites that the justice who rendered the judgment "was duly elected justice of the peace for Lexington township, Lafayette county, Missouri," and having duly qualified, the docket of Callahan, with this case, was turned over to him; he certifies the transcript as "justice of the peace within and for the township of Lexington, in the county of Lafayette and State of Missouri;" and the defendant appeared before him and appealed.

The statute in force at that time, gave justices jurisdiction in these cases, without regard to amount, when the injury occurred within their respective townships. It is not denied but what the injury occurred in the township of which Tutt was justice, but the complaint is that there was no proper venue to show that fact.

Defendant appeared to the merits in the circuit court, submitted to a trial of the cause, and obtained the full benefit of all the merits there were in its case. Had the suit been commenced in the circuit court, where technical rules of pleading prevail, the judgment on the merits would have precluded it from taking advantage of the "want of any venue, if the cause was tried in the proper county." R. S. 1879, § 3582. How much more force there is in applying this rule to this case, which was commenced in a court where technical rules of pleading are ignored. The record amply shows that the justice had jurisdiction under the statute, the defendant has had the benefit of a

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trial on the merits, the judgment is sufficient to protect it against another suit for the same injury, so far as this objection is concerned, and we cannot understand how the defendant can be injured by the want of a proper venue to the complaint. The objection arises as one of pleading, not of fact, and is too technical to warrant the reversal of the judgment, when it can serve no other purpose than to permit the complaint to be amended. The objection was cured by the verdict; the entire record showing that the justice had jurisdiction.

The third point insisted on by appellant is, that "the return of the constable did not give the court jurisdiction over the defendant." This, if true, could only relate to jurisdiction of the person, which may be waived. The defendant appeared on the merits, and submitted to a trial of the cause. This was a waiver of any defect in the service of the summons. *Delinger v. Higgins*, 26 Mo. 180. Numerous cases might be cited to the same effect. True, the appellant filed its motion to dismiss, which was overruled, and exceptions duly saved thereto; but the rule to be deduced from the cases is, that there should have been no further appearance, in order to secure the benefit of the objection. It could not consistently appear and save exceptions to the jurisdiction and then proceed with the trial of the cause in a court possessing no jurisdiction over the person, when, by the very act of appearing further, the requisite jurisdiction was conferred. A party must either appear at the trial and abide the consequences or not appear at all. *Tower v. Moore*, 52 Mo. 118; *Griffin v. Van Meter*, 53 Mo. 430; *Smith v. Monks*, 55 Mo. 106; *Rippstein v. Ins. Co.*, 57 Mo. 86; *Huff v. Shepard*, 58 Mo. 241; *Peters v. R. R. Co.*, 59 Mo. 406; *Hulett v. Nugent*, 71 Mo. 131. Besides, the motion to dismiss only states this ground: "Because the justice did not have, nor has this court, jurisdiction of the defendant." The specific grounds are not shown, and it is not clear that this particular objection was raised below.

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The fourth point insisted on by appellant is, that it does not appear that the jurisdiction of the case was transferred from Callahan to Tutt. Callahan's docket was in the possession of Tutt, the defendant appeared before him and took the appeal, finding no difficulty in tracing up the docket for that purpose, and he certified the transcript on the appeal. The presumption is, that he was in the lawful possession of the docket. *Linderman v. Edson*, 25 Mo. 105. If the facts were otherwise, the defendant should have made them a matter of defense.

4. JUSTICES' COURTS:
jurisdiction:
prima facie evi-
dence.

The last point insisted on by appellant is, that the justice's transcript shows a complaint in the name of Krinshee, while the judgment was rendered in favor of Kronski, and it is argued that unless the names are *idem sonans*, the defendant appealed from a judgment rendered without jurisdiction, and the circuit court should have sustained its motion to dismiss. The complaint was as much the foundation of the action in the circuit court, where the trial was *de novo*, as before the justice, and the circuit court rendered precisely the same judgment as the justice. No objections were saved to this action of the circuit court, except in overruling the motion to dismiss, and the only question is as to the propriety of overruling the motion. There is no question but what Kronski was the real party injured, and no pretense that Krinshee had any connection with the injury. There was simply a misnomer, which was corrected on the records, and the case, thereafter, proceeded to judgment in both courts in the name of the proper party. Defendant conformed to this amendment by entitling all its papers, even the motion to dismiss, in the name of Kronski. It failed to appear before the justice and insist upon the error, and went to trial on the merits in the circuit court, and submitted to a judgment in the name of Kronski, without undertaking to show that he was not the proper party. Service of process on the right party by a wrong name is

5. ———: MISNOMER:
judgment.

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a good service, and gives the court jurisdiction. For equally strong reasons, service in favor of the right party by the wrong name is good.

These matters may be amended and the judgment taken in the proper name. If a party, served by the wrong name, fails to appear and make the defense, or submits to a judgment by the wrong name, the judgment will bind him as effectually as though rendered in the right name. *Parry v. Woodson*, 33 Mo. 347; *Weber v. Ebling*, 2 Mo. App. 15. The converse is true as applied to this case, and both plaintiff and defendant are bound by the judgment. Formerly, the rule required misnomer to be taken advantage of in abatement. *Thompson v. Elliott*, 5 Mo. 118; *Carpenter v. State*, 8 Mo. 291; 1 Chitty Plead., (16 Am. Ed.) 265, 266. The defect could have been cured by amendment, after judgment, in affirmance of the judgment. R. S. 1879, § 3570. It was cured by the verdict, the statute treating the proper amendment as having been made. R. S. 1879, § 3582. It furnished no ground for dismissing the case, and the circuit court did not err in that respect; it does not affect the jurisdiction so as to authorize its consideration on the face of the record, and it is not otherwise presented to this court. 1 Chitty Plead., (16 Am. Ed.) 266. The right party has recovered a judgment in his proper name, defendant has submitted to that recovery without suggesting the contrary, and we can imagine no reason why it should be reversed. The judgment should be affirmed. All concur.

CISSELL V. CISSELL'S Executor, Appellant.

1. **Settlement of Deceased Guardian's Accounts: APPEAL.** An appeal from proceedings against the executor of a deceased guardian to compel him to settle the accounts of the guardianship, must be taken during the term or within ten days thereafter, as prescribed by the Administration Act, (Wag. Stat., p. 119, § 2; R. S. 1879, § 293,) and not within six months after the decision, as prescribed by the Guardian Act, (Wag. Stat., p. 681, § 50; R. S. 1879, § 2616).
2. **Appeals.** If an appeal be not taken in time the appellate court has no power to make any order in the case except to dismiss the appeal or strike the case from the docket. It cannot inquire into the jurisdiction of the lower court.

Appeal from Cape Girardeau Circuit Court.—HON. W. H. BENNETT, Judge.

AFFIRMED.

John H. Nicholson for appellant.

J. C. Killian for respondent.

NORTON, J.—On motion of plaintiff, the defendant, Isidore Cissell, executor of Joseph Cissell, deceased, filed in the probate court of Perry county, his accounts for final settlement of his testator's curatorship of Mary G. Cissell, plaintiff, and at the August term, 1877, of said court, and on the 18th day of said month, the court adjudged that the sum of \$4,598.53 was due plaintiff, and ordered said executor to pay it. From this judgment an appeal was taken by defendant on the 18th day of January, 1878, to the circuit court of Perry county, and the same was transferred from said court, by change of venue, to the circuit court of Cape Girardeau county, when, on plaintiff's motion, the appeal was dismissed, for the reason that it was not taken either at the term of the probate court at which the judgment was rendered, or within ten days thereafter. From this action of the circuit court defendant has ap-

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pealed to this court, and the only question which the record presents is, whether such action was proper.

It is insisted by counsel for defendant that under section 50, 1 Wagner's Statutes, page 681, he was allowed six months after the judgment of the probate court was rendered, within which to take his appeal. This, we think, is erroneous, as it

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DECEASED GUAR-
DIAN'S ACCOUNTS:
appeal.

will be seen by reference to said section that it relates only to appeals from the final settlement of living guardians required to be made by section 48, 1 Wagner's Statutes, 681, and not to appeals from a proceeding against an executor of a deceased guardian to have a demand established in favor of the ward against the estate of a deceased guardian, who at the time of his death was entitled to be discharged as such guardian for any of the causes or reasons mentioned in said section 48. The proceeding in this case falls in the latter class, and an appeal from a judgment in such a proceeding is governed by section 2, 1 Wagner's Statutes, page 119, which requires that it shall be taken during the term at which the decision complained of is made, or within ten days thereafter, and as the appeal in this case was not taken within that time, it was properly dismissed.

It is insisted that the court should not have dismissed the appeal, but the proceeding in the probate court, on the ground of want of jurisdiction. Inasmuch as the appeal to the circuit court was not taken within the time prescribed by law, the circuit court had no other jurisdiction over the cause than to dismiss the appeal or strike the cause from its docket. Judgment affirmed. All concur.

2. APPEALS.

Hutcherson v. Briscoe.

HUTCHERSON V. BRISCOE *et al.*, Appellants.

Equity Pleading: TRUSTS. In a suit to enforce a trust attaching to real estate, the petition alleged that defendants' ancestor had purchased the land at a sale under a deed of trust executed by plaintiff, under an agreement that the ancestor should rent the land, receive the rents, and after re-imbursing himself for his outlays, re-convey to plaintiff; and that the rents, together with certain payments made by plaintiff, had more than made good all the outlays; and the petition prayed for a decree for the land and for any excess of rents. The court, besides decreeing the title to plaintiff, took an account of the outlays of defendants' ancestor and of the payments made by plaintiff, and the rents received by defendants, and gave judgment in plaintiff's favor for the excess of the latter. *Held*, that this decree was within the scope of the pleadings.

Appeal from Ralls Circuit Court.

AFFIRMED.

Christian & Roy and C. A. Winslow for appellants.

T. L. Anderson and D. G. Davenport for respondents.

MARTIN, C.—This was a suit in the nature of a bill in equity, commenced in March, 1877, in which the plaintiffs asked that the defendants be divested of a certain parcel of land formerly owned by Elizabeth Hutcherson, one of the plaintiffs, and that the same be vested in her.

It is recited in the amended petition that in 1868 the land was owned by said Elizabeth, subject to a deed of trust to secure a debt of \$555.75; that on the 23rd day of October, 1869, William T. Briscoe became the purchaser of the land for \$698, at the trustee's sale, under such an arrangement and understanding with said Elizabeth as to impose on him a trust in her favor, by which he was to rent the lands, receive the rents, and after re-imbursement for his outlays, from such rents and other sums as should be furnished by her, from time to time, to re-convey the same to her; that William Briscoe died in 1870, leaving Joseph

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Briscoe as his only heir, and that John Briscoe became his administrator. It is alleged that the payments made by plaintiffs and the rents received from the property more than reimbursed the parties holding it, and a decree for the land and any excess of rents was asked for.

John Briscoe and Joseph Briscoe filed a joint answer. There seems to be no answer from Parker, but from the recitals in the record he appears to have been treated as answering along with the Briscoes. In this answer the original contract or understanding between said Elizabeth and William Briscoe is put in issue. The answer then goes on to set up another understanding or arrangement of compromise, by which the defendants agreed to convey the lands to plaintiffs, upon payment by plaintiffs of certain sums therein mentioned; that their title-bond to that effect was sent to plaintiffs, but that plaintiffs failed and refused to comply with the terms of the compromise. There were other allegations in the answer which need not be mentioned, except as hereinafter touched upon.

The case was submitted to the court upon the pleadings and proofs, and a decree was rendered in favor of the plaintiffs, in which the issues were found in their favor. The court also proceeded "to take an account of the matter between the parties pertaining to said purchase money remaining unpaid, and of the several amounts so paid by plaintiff Elizabeth, as aforesaid, and of the several sums so paid to and received by defendants John Briscoe and Joseph Briscoe, on account of the rents and profits of said land, as aforesaid, with the interest severally accruing on all said sums, from an examination and estimate whereof, the court finds that the defendant Joseph Briscoe has received, as rent of said premises, an excess over and above said purchase money and all interest and costs thereon, of the sum of \$400." The decree awards execution against him for this amount.

Joseph Briscoe prosecutes this appeal, complaining only of that part of the decree adjudging against him the

\$400. There was no bill of exceptions, no motion for rehearing or in arrest of judgment. His counsel insists that the order to pay the \$400 is an error on the face of the record, and not dependent upon a bill of exceptions or motion of any kind.

To maintain this point it is incumbent on them to show that the decree for \$400 against Joseph Briscoe could not be within the issues of the case, according to any fair intendment of the pleadings. A brief review of the nature of the case and the allegations bearing upon the matter of rents and profits must satisfy any one that the finding of the court was clearly within the issues. It will be observed that this is not an action of ejectment. A right to the rents in an equitable action to enforce a trust, does not depend upon the actual occupation of the premises by the defendant. He may be charged in equity with the rents, because of the relation he held to the property as trustee, or the part he has taken in some breach or denial of trust, of which he had notice. Now this property was subject to a trust in favor of plaintiffs, while owned by William Briscoe. On the death of William, the legal title descended to Joseph, who was his sole heir, and it vested in him subject to that trust. It was his duty to observe and carry out the trust which rested upon the legal title. The answer admits that instead of doing this, he conveyed the property in 1872 to John Briscoe. It also admits that in 1873 John conveyed it back again to Joseph. The answer further admits that in 1874 Joseph made a contract to convey the land to Parker, who was the tenant of William, immediately after the purchase at trustee's sale; that this contract was rescinded in 1875, by their mutual consent, which returned the absolute title again to Joseph; that Joseph was in possession in 1874 and 1875, except while Parker held it under his contract. Of course Parker, who was a tenant and had undertaken to buy the land, may be reasonably presumed to have in some way accounted for the rent to Joseph when the contract was rescinded by

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mutual consent. The answer admits that Joseph was a party with John, the administrator, to a contract to convey the land back to plaintiffs upon the compromise set out in the answer. Now, in so far as these dealings were conducted for the sole benefit of Joseph, they were in derogation of the trust. The answer admits that the land is now in Joseph. It further admits "that they (John and Joseph) received the sum of about \$400 in money, and money's worth, as rent for said land since the death of said Wm. T. Briscoe," and avers that more than this sum was expended for taxes on the property, etc.

The plaintiffs asked to have the legal title divested from Joseph as one of the defendants. This was asked upon the theory that the rents of the property and payments of plaintiffs had more than discharged the debt for which it was held in trust. The petition contains a prayer for the excess, and concludes with a general prayer for relief. A decree against this owner and holder of the title for \$400 of rents in excess of the debt on the property, is in my opinion clearly within the scope and intendment of the bill. In amount it does not exceed what Joseph admits went into his hands.

The judgment is affirmed. PHILIPS, C., concurs; WINSLOW, C., not sitting, having been of counsel when the cause was submitted to the court.

BURCKHARTT, Appellant, v. HELFRICH's Administrator.

1. **Administration : CLASSIFICATION OF DEMANDS : PROBATE COURTS : JURISDICTION.** Under the statute, (R. S. 1879, § 184,) demands legally exhibited against an estate after the end of one year, and within two years after the grant of letters, must be placed in the sixth class. The fact that at the time of their allowance there had been no distribution of assets, will not entitle them to be placed in the fifth class. Probate courts have no equitable jurisdiction in the classification of demands.

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2. — : — : EXHIBITION OF DEMANDS. The mere rendition of a judgment against a surety and the administrator of his principal before the end of one year after the grant of letters to the administrator, is not a legal exhibition by the surety within the year of any demand against his principal's estate. Until he has paid the judgment he has no demand to exhibit. When he has done this, his claim must be presented to the administrator, and will be classified as of the date of such presentment.

Appeal from Cooper Circuit Court.—HON. GEO. W. MILLER,
Judge.

AFFIRMED.

John Cosgrove for appellant.

When the demand accrues after the granting of letters, the statute commences to run from the time the demand accrues. *Miller v. Woodward*, 8 Mo. 169; *Finney v. State*, 9 Mo. 227; *Chambers v. Smith*, 23 Mo. 174; *Burton v. Rutherford*, 49 Mo. 255; *Greenabaum v. Elliott*, 60 Mo. 25. Now, by what rule is it to be classified? Is it to be barred from the fifth class because it was not exhibited within one year from the grant of letters? No; for the same reason would bar it from the sixth class. A careful reference to the language of the statute, and to the entire administration law, suggests no more reason for barring a demand exhibited within one year after it accrues from the fifth class, than for barring one from the sixth class, exhibited after one year but within two years after it accrues, for certainly, in the particular class to which he belongs, the rights of a sixth class are as sacred as those of a fifth class creditor. *Brewster v. Kendrick*, 17 Iowa 479.

Draffen & Williams for respondent.

All demands exhibited after the end of one year from the granting of the first letters upon the estate, must be placed in the sixth class. Gen. St. 1865, chap. 123, § 1; R. S. 1879, § 184; *State Bank v. Tutt*, 44 Mo. 366; *Pfeiffer*

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v. Suss, 73 Mo. 245. The question in the case at bar is not when the special statute of limitations began to run against the plaintiff's claim, and the decisions holding that demands arising after the grant of letters, are not barred by the statute of two years have no application to this case. The question of classification depends upon very different considerations. *Bank v. Tutt*. 44 Mo. 366.

PHILIPS, C.—One Helfrich was appointed by the Howard county court administrator of the estate of Boschert. The appellant was one of the sureties on the administrator's bond. Helfrich died intestate in Cooper county in 1875, and on a settlement of accounts as administrator of Boschert's estate, a deficiency was declared against his estate of \$877.69. One-third of this amount was paid by appellant upon a judgment against him as such surety. Sombart was administrator *de bonis non* of Boschert's estate, and he was the plaintiff in the said judgment of recovery against appellant and the respondent as administrator of Helfrich's estate. This judgment was rendered November 6th, 1876. Said appellant paid off his proportion the same day. He presented for allowance the sum so paid by him against the estate of Helfrich in the probate court of Cooper county, and the same was allowed and placed in the sixth class. From the action of the probate court in placing the allowance in the sixth instead of the fifth class, the demandant appealed to the circuit court, where on trial *de novo*, the judgment of the probate court was affirmed, and the appellant appealed to the Supreme Court. The record and proofs show that this demand was not presented for more than one year after the grant and due publication of letters of administration on the estate of Helfrich, but was presented within two years thereafter.

The principal and controlling question presented by this record is: Was the demandant entitled to have his

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1. ADMINISTRATION: allowance placed in the fifth class? If he
 classification of
 demands: probate
 courts: jurisdic-
 tion. was, the judgment or order of the lower
 courts was wrong; if he was not, the action
 of those courts should stand.

Section 1, chapter 123, General Statutes 1865, in force when this case was tried, provides that "all demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate," shall be placed in the fifth class. "All demands thus exhibited after the end of one year and within two years after letters granted," go to the sixth class. Section 26 provides that the clerk shall keep an abstract "of all demands * * against such estate, which shall show their amount, date and class," etc. Section 27 makes it the duty of the court when demands are allowed, "to determine their class, * * and when thus classified, the executor or administrator may satisfy such demand according to such classification." Section 29 directs that "all demands against any estate shall be paid by the executor or administrator as far as he has assets, in the order in which they are classified, and no demand of one class shall be paid until all previous classes be satisfied."

Chapter 124 of this statute clearly indicates that it was the legislative intent to prevent tardiness in the administration of estates, and the holding up from creditors the funds due them, an evil often practiced by executors and administrators to their own gain and the oppression of creditors. To this end they are required to make, under penalty, annual settlements with promptness, and at the end of the first year, on the annual settlement, the court may direct an apportionment and payment of the assets among the creditors whose claims have then been allowed, which would cover those of the fifth class. Now, if a claim exhibited after the lapse of one year may be placed in the fifth class, what effect would this have in the contingency that the assets had been exhausted in paying

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claims allowed in the first year? The classification of such claim would be unavailing, for there is no provision of law for restitution by the preferred creditors.

Appellant's counsel insists with much plausibility that he proposed to show when his claim was allowed that there had been in fact no distribution of assets. As this proof was excluded by the circuit court, we must treat this offer as if the proof had been made, should this judgment be affirmed. To sustain his position we are referred to *Brewster v. Kendrick*, 17 Iowa 479. It must be observed in considering this case that the statute of Iowa is local and peculiar. It provides, *inter alia*, that demands shall be paid in the following order: * * 3. Claims filed within six months after the notice given by the executors of their appointment. And then follows this provision. "All claims of the fourth class not filed and proved within one year and a half of the giving of the notice, are forever barred, unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the plaintiff to equitable relief."

The claim presented was admittedly barred unless the circumstances attending its non-presentation within the time were so peculiar as to entitle the claimant to equitable relief. Two of the judges placed some stress on the fact that in addition to the strong equities in favor of the claimant, it appeared that the "larger part of the claims against the estate are held by the relatives of the decedent and the administratrix, that the estate is still unsettled, and that a dividend had been made among creditors, but retaining the *pro rata* share to which plaintiff would be entitled if his claim should be finally allowed." It seems the claimant did not know he had the claim against the estate until the limitation had run, and that the misconduct of the administrator in a measure occasioned the delay. But even under such a statute as this, lodging in the probate court something of discretion to be evoked by "peculiar circumstances," it is significant that the other two judges held

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that such delinquent creditor can only have his demand allowed as a fourth class claim, that but for the peculiar equities contemplated by the statute the claim would be absolutely barred, and that if allowed at all, it must and can only be as one to be paid after the satisfaction of third class demands. In short, they held that if the creditor presented his claim after the eighteen months had run, the bar could only be moved for equitable causes, and then only to be let into the fourth class; but he could not be let in at all as a six months creditor when he filed his claim after that time. "In other words, the court can only remove the bar, and the law fixes the class to which it belongs." The court being equally divided, the judgment of the lower court was affirmed, denying the right to the preferred classification.

Our probate courts have no such equitable discretion or jurisdiction. Their functions are statutory. Under such a statute as ours the courts, in the matter of allowances and classification of demands, have felt bound by the letter of the law. *Langham v. Baker*, 5 Baxter (Tenn.) 701; *Spaulding v. Suss*, 4 Mo. App. 541.

The view taken by the two judges of the Iowa statute last quoted will serve to throw light upon the real import of the decisions of the Supreme Court of Missouri, in which it has been repeatedly held that the two years limitation did not have the effect to cut out a claim where the cause of action had not accrued until the limitation had run. *Miller v. Woodward*, 8 Mo. 169; *Chambers v. Smith*, 23 Mo. 174; *Burton v. Rutherford*, 49 Mo. 255. All the court decides in these cases is, that the demandant will be let in to prove his claim. But we take it that, as was held in the Iowa case, the court can only remove the bar, and the law fixes the class to which it (the claim) belongs. In none of the cases was it ever asserted that such creditor would be let in to the fifth class. Other sections of the statute confirm me in this conclusion. The third section of chapter 123, declares that an action pending against any

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person at the time of his death which survives against the administrator, shall be deemed as a demand legally exhibited against the estate "from the time such action shall be revived, and classed accordingly." So that, I take it, if the action should not be revived until the one year had elapsed, the claim could not be assigned to the fifth class. Such I understand to be the construction given in effect by the Supreme Court of this State to this section in the case of *State Bank v. Tutt*, 44 Mo 366. The demand was founded on a judgment recovered against the decedent in his lifetime, and it was claimed that it should be classed in the fourth class. Bliss, J., said: "These provisions clearly show that no demand requiring presentation and allowance can be placed either in or forward of the fifth class, unless presented within the year; * * and judgments, as well as other debts, not presented until after the first year, must be placed in the sixth class."

Appellant further seeks to evade the operation of this construction by claiming that he had, under an equitable ^{2. ———: ———: exhibition of demands.} construction of the statute, exhibited his demand within the year. The evidence on which he relies to sustain this pretension is, that Sombart, as administrator *de bonis non* of Boschert's estate, within the year obtained judgment against the estate of Helfrich and the appellant as his surety on his bond. This appellant contends was constructively an exhibition of his demand, Helfrich's estate being a party to that action. But that was not sufficient. The appellant had no demand against this estate until he paid that judgment. *Hearne v. Keath*, 63 Mo. 89. The mere rendition of a judgment against him as a surety gave him no right in law or equity to maintain an action against his principal. The doctrine of subrogation has no application to such a case. When he paid off the judgment it ceased to be a claim against Helfrich's estate, and when he comes forward with his claim as surety, it is in his own right, and is a demand of a new impression.

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Whatever a court of equity might do in protecting by subrogation the surety, the probate court, in administering the statute law, could only regard the rights of the demandant from the date of the exhibition of his demand against the estate. *Spaulding v. Suss, supra*; *Miller v. Woodward*, 8 Mo. 169. The hardship of thus interpreting this statute is more seeming than real. The present case is an illustration. When the judgment was rendered against the surety and the administrator of his principal, the first year of the administration had not expired. He could easily have then paid off this judgment and had his claim allowed and placed in the class he so much desired.

The order of the probate and circuit courts in the classification of this allowance was proper, and the judgment of the circuit court is affirmed. The other commissioners concur.

JOERDENS, *Appellant*, v. SCHRIMPF.

Deed of Trust: WRONGFUL ENTRY OF SATISFACTION: PAROL EVIDENCE TO AVOID IT. The payee of a negotiable note secured by a deed of trust, after parting with his interest in the note, acknowledged satisfaction of the deed of trust on the margin of the record. In ejectment brought by a purchaser at a sale subsequently made by the trustee; *Held*, that he was not driven to a suit in equity to cancel the entry of satisfaction, but might show by parol evidence that the interest of the payee had expired, and, therefore, his power to acknowledge satisfaction.

Parol evidence to explain a record is always admissible.

Appeal from Franklin Circuit Court.—HON. A. J. SEAY,
Judge.

REVERSED.

Crews & Booth for appellant.

Beyersdorff & Kiskaddon and John R. Martin for respondent.

WINSLOW, C.—This is an action of ejectment, instituted in the Franklin circuit court April 27th, 1877, for a parcel of ground in the town of Washington in said county. The petition is in the ordinary form, and the answer a denial of its allegations. The case was tried before the court. On the trial, after an adverse ruling by the court on the evidence, plaintiff submitted to a non-suit, and, after an unsuccessful motion to set the same aside, duly perfected an appeal to this court.

Plaintiff derived his title from defendant, through a deed of trust executed to secure a negotiable promissory note to one Christian Ohlendorf, who indorsed the same to plaintiff, before maturity, and for value. The deed of trust was in the usual form, and contained a provision that the sheriff of the county might make the sale in the event of the refusal of the trustee to act. The trustee refusing to act, the plaintiff procured the sheriff to make the sale, at which he became purchaser and received a trustee's deed for the premises in dispute. The note, deed of trust, written refusal of the trustee to act, advertisement of the sheriff, and the deed to plaintiff, in connection with evidence of the ouster and value of the rents and profits, were all finally admitted in evidence; the court reserving its opinion on all objections to testimony until the end of the case, and then disposing of them all together. These various documents were all formal and regular, and sufficient in law to vest the apparent legal title in plaintiff, and no question arises as to their validity.

The note secured by the deed of trust bears date February 2nd, 1876, is negotiable in form, made payable to Christian Ohlendorf one year after date, signed by August Schrimpf, and has the name of Christian Ohlendorf indorsed upon the back. The deed of trust bears the same

date, and was recorded in Franklin county. No date appears to the indorsement of Ohlendorf.

To defeat this apparent legal title in plaintiff, the defendant offered in evidence the following entry of satisfaction on the margin of the record of the deed of trust: "I hereby acknowledge satisfaction in full of the within deed of trust. Witness my hand and seal, this 16th day of March, 1877. Christian Ohlendorf. Attest: Herman Weisel, Recorder of Deeds." Plaintiff objected to this testimony because the note was indorsed to him for value before maturity, and at the date of the entry of satisfaction Ohlendorf had no title to the note or deed of trust. The objections were finally overruled. Plaintiff, both in presenting his own case and in rebuttal of the entry of satisfaction, gave evidence tending to show that the name of Ohlendorf was written on the back of the note, and the note assigned to him November 16th, 1876, and that he paid value for the note. This evidence was objected to as inadmissible to contradict or impeach the record, and in the final disposition of the case it was excluded.

Defendant, also, offered oral evidence tending to show the circumstances under which the note and deed of trust were executed and indorsed and the satisfaction entered, but this evidence was excluded by the court.

The court evidently decided this case upon the theory that parol evidence was inadmissible to affect the record entry of satisfaction of the deed of trust, and the propriety of this ruling is the only question for determination.

The doctrine is now well established in this State, that the indorsee for value of a negotiable note secured by mortgage takes the security by the same title that he takes the note, and that he cannot be affected by any payments made to the indorser after the indorsement, and even before the indorsement, unless he had notice of them at the time of the purchase, but is entitled to enforce the security for the full amount due. *Logan v. Smith*, 62 Mo. 455; *Goodfellow v. Stillwell*, 73 Mo. 17. Hence, if the plaintiff

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purchased the note for value, before maturity, and before the entry of satisfaction, the payment to Ohlendorf and his entry of satisfaction on the record could not affect the security afforded by the deed of trust. The excluded evidence tended to fix the date of the indorsement, and to show that it was made for value, before maturity, and before the entry of satisfaction. The effect of this evidence was not to impeach, vary or destroy the record, but to explain its effect by showing that the party by whom it was made acted without authority. Parol evidence to explain a record is always admissible. *Emory v. Joice*, 70 Mo. 537; *Johnson Co. v. Lowe*, 72 Mo. 637. There can be no question but what this evidence was admissible.

Respondent now maintains that the legal effect of the entry of satisfaction was to re-vest the title in the grantor in the deed of trust, leaving a mere equity in the plaintiff to have the satisfaction set aside, if not properly entered, and that this must be done by a proceeding in equity, or a count in the petition asking equitable relief. The statute relied on, (R. S., § 3311,) does not declare what shall be the effect of an entry of satisfaction by the mortgagee, trustee or *cestui que trust*. It is only when the entry is made by an attorney in fact that it shall have the effect of revesting the title in the person who executed the deed, or his legal representatives. R. S. § 3313. A fair construction of the two sections might give the same effect to both. In a case where there is no dispute about the entry, or the power to make it, the law would give it the effect of extinguishing the incumbrance and revesting the title for the benefit of whoever happened to be the owner at the time. *White v. Todd*, 10 Mo. 189; *Gale v. Mensing*, 20 Mo. 461; *Leitensdorfer v. Goebel*, 31 Mo. 474; and the statute can have no greater effect. But this does not meet the exigencies of the respondent's case. The statute recognizes the assignee of the mortgage as the proper party to enter the satisfaction, and it has been held that he is the proper party to make the entry. *Ewing v. Shelton*, 34 Mo. 518.

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If the excluded evidence be true, Ohlendorf was not the *cestui que trust* when the entry was made, he was not the person authorized by statute to make it, and it stands on the record a mere nullity. It should be observed that no question of notice is involved here to give any effect to the entry.

Valle v. American Iron Mountain Co., 27 Mo. 455, is conclusive against the respondent on this question. It is there held that an entry of satisfaction under the statute, aside from giving notice, has no more effect than a parol release of the mortgage. The distinction between an entry under this statute and the entry of satisfaction of a judgment is noted, and it is expressly held that in the case of a mortgage a direct proceeding is not necessary to impeach the entry of satisfaction for fraud. In the concluding paragraph of the opinion, it is conceded that it may be impeached by parol evidence under the pleadings in ejectment. In *Chappell v. Allen*, 38 Mo. 213, these entries are held to be only *prima facie* evidence of the payment of the debt, like a receipt, and are open to explanation by parol evidence.

The excluded evidence does not go to the extent of impeaching the record for fraud; it simply shows that the party had no power to make it, or to receive payment of the debt, so as to affect the rights of the plaintiff to the security, as determined by the cases of *Logan v. Smith* and *Goodfellow v. Stillwell*, heretofore cited.

The judgment should be reversed and the cause remanded. All concur.

Cutler v. Cook.

CUTLER V. COOK *Plaintiff in Error.*

Negotiable Paper: SET-OFF. A negotiable promissory note transferred after maturity passes into the hands of the indorsee subject only to such equities and defenses as are connected with the note itself, not such as grow out of distinct and independent transactions. The statute of set-off, (R. S. 1879, § 3868,) is not applicable to negotiable paper. Overruling *Munday v. Clements*, 58 Mo. 577.

Error to Schuyler Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Higbee & Shelton for plaintiff in error, cited *Munday v. Clements*, 58 Mo. 577; *Norton v. Foster*, 12 Kas. 49; *Newberry v. Trowbridge*, 13 Mich. 263.

Vrooman & French for defendant in error.

MARTIN, C.—This was an action on a negotiable promissory note commenced on the 24th day of January, 1879. The note was as follows:

“GLENWOOD, Mo., April 9th, 1878.

Four months after date, I promise to pay B. S. Shirley, or bearer, \$23.44, for value received, with interest from date at the rate of ten per cent per annum.

(Signed)

ELI COOK.”

A payment of \$10 is indorsed on it of the 12th day of April, 1878.

The defendant Cook filed an answer pleading, as a set-off against the note, an order for \$35 in timber, drawn by C. E. Vrooman, Allen James and A. B. James, in favor of Edward Higbee, and directed to B. S. Shirley, who accepted it in writing; that payment had been refused to Higbee, who afterward assigned it to E. Binny, who indorsed and delivered it to the defendant in this case after the maturity of the note sued on, and before Shirley, the payee or bearer, had transferred it to any one; that while

defendant had the order and Shirley held the note, defendant demanded payment of the order, and that Tannehill, to whom Shirley first assigned the note, had full knowledge of the set-off pleaded.

The trial resulted in a judgment for plaintiff for the full amount due on the note. When the case was taken up to the circuit court the plaintiff interposed a demurrer to the answer pleading the set-off. This demurrer was sustained, and the trial resulted in a judgment for plaintiff for the full amount sued for.

The amounts involved in the suit are small, but the point for decision is a very important one to the commerce of the State. It is maintained by the plaintiff in error that our statutes relating to offsets and defenses will authorize an offset of an independent debt to negotiable paper acquired by the plaintiff after maturity, provided the offset existed against the holder after maturity, and with notice of the offset. There ought to be no doubt about the law on this question, but unfortunately the decisions of the courts of last resort furnish some cause for doubt and uncertainty.

The 3rd and 4th sections of the act concerning bonds and notes in the Revised Statutes of 1835, provided that the maker or obligor of a bond or note should be allowed every just set-off against the assignor or assignee, unless it contained the words which made it a negotiable instrument. R. S. 1835, p. 105. The statute regulating set-off contained nothing bearing on the subject. The substance of these provisions seems to have been in force prior to the revision of 1835. These two sections were carried forward into the revision of 1845, (R. S. 1845, pp. 190, 191, §§ 3, 4); the statutes on set-off remained unchanged in respect to bonds and notes. These sections, with a slight change in phraseology, appear in the revision of 1855, and the statutes on set-off remain the same. R. S. 1855, p. 322, §§ 3, 4. In the General Statutes of 1865, these two sections are left out of the statute which was denominated

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"Contracts and Promises," in which they had always appeared under its old designation of "Bonds and Notes." But the statute on offset included a section which was evidently intended to take the place of the discontinued provisions. It reads as follows: "In actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off, or other defense, which existed in his favor at the time of his being notified of such assignment." Gen. St. 1865, p. 602, § 2. This section is carried into the revision of 1879, and constitutes section 3868 in the statute of set-off, (R. S. 1879, § 3868,) and it does not appear in any form in the statute on "Contracts and Promises."

When these provisions were first construed they were held by Judges McGirk and Scott to apply only to non-negotiable paper. *Collins v. Waddle*, 4 Mo. 452; *Maupin v. Smith*, 7 Mo. 402. These decisions were rendered in 1836 and 1842. In 1847, Judge Wash held in *Baker v. Brown*, 10 Mo. 396, that the statute applied to negotiable paper provided it was fraudulently assigned to avoid any legal set-off. This decision was followed by Judge Ryland in 1857 in *Martindale v. Hudson*, 25 Mo. 422. No reference in it will be found to the early decisions or the statute, nor to the case of *Gullett v. Hoy*, 15 Mo. 399, decided by Judge Gamble in 1852, in which he followed the law as laid down in the early decisions, and laid down the doctrine that a negotiable promissory note transferred after it became due passes into the hands of the indorsee subject only to such equities and defenses as are connected with the note itself, not such as grow out of distinct and independent transactions. This doctrine has been affirmed so often that it ought to be regarded as settled. *Wheeler v. Barret*, 20 Mo. 573; *Unsold v. Stephenson*, 33 Mo. 161; *Mattoon v. McDaniel*, 34 Mo. 138; *Arnot v. Woodburn*, 35 Mo. 99; *Haeussler v. Greene*, 8 Mo. App. 451; *Grier v. Hinman*, 9 Mo. App. 213.

The decision of Judge Wagner in *Munday v. Clements*, 58 Mo. 577, holding that this provision about set-off applies to

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negotiable promissory notes when transferred after maturity, is in conflict with the decisions upon the subject since 1836. The provision in the statutes of 1865 and 1879, more clearly than the old sections for which it was substituted, purports to apply to non-negotiable instruments; and in the decision of *Gullett v. Hoy*, Judge Gamble held that the provisions of the old statute did not apply to negotiable paper transferred after maturity. The language of the section, 3868, which was in force when the note sued on was made and assigned, preserves the right of set-off in actions on assigned accounts and "non-negotiable instruments." The note sued on was not a non-negotiable instrument. It was a negotiable instrument, and its description as an instrument is not changed by the fact of assignment after maturity.

The argument against the right of set-off in this case may be stated as follows: Under the law merchant governing negotiable paper, a negotiable instrument passing into the hands of an innocent holder for value before maturity, is exempt from all equities between the original parties. When it passes for value after maturity, the purchaser acquires it subject to such equities as are connected with or inhere in the paper, but exempt from all equities arising out of independent and collateral transactions. Story on Bills, (4 Ed.) § 220; 1 Edwards Bills and Notes, (3 Ed.) § 379; *Burrough v. Moss*, 10 Barn. & Cress. 558; *Whitehead v. Walker*, 10 M. & W. 698; *Robinson v. Lyman*, 10 Conn. 30. Under the law merchant this note passed to the plaintiff exempt from all rights of set-off on account of independent transactions between the original parties. These are not, properly speaking, equities. The legislature has seen fit to provide for the preservation of the rights of set-off, and in doing this they have preserved it in favor of the maker of non-negotiable paper. This leaves negotiable paper as it existed under the law merchant. Such paper is not only left as before, but it is

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impliedly continued by the act as it existed under the law merchant.

I may add here that the answer stricken out did not contain the statement of any fact, such as insolvency or non-residence of the assignor, upon which equity might interpose and decree or adjudge an equitable offset.

The judgment is affirmed. PHILIPS, C., concurs; WINSLOW, C., not sitting.

HOLLIWAY V. HOLLIWAY, *Appellant*.

1. **Equity: CANCELLATION OF CONVEYANCE FOR FRAUD.** Where the evidence showed that the parties to a conveyance of land were brothers, that the grantor was a cripple, diseased in body, and of weak mind, and under the control of the grantee by whom his fears of a breach of promise suit and loss of property were operated upon, for which there was no foundation in fact; that there was no consideration paid and none to be paid, and that the conveyance was induced by the fears of the grantor and the promise of the grantee to re-convey the land; *Held*, sufficient to warrant a decree setting aside and cancelling the conveyance.
2. —: PRACTICE, CIVIL: DISMISSAL OF ONE OF THE COUNTS IN A PETITION. Where the first count in a petition seeks the cancellation of a deed on the ground of fraud and undue influence, and the second count, a settlement of a partnership in personal property, the plaintiff may properly be allowed to dismiss the latter, since it states a separate cause of action.

Appeal from Buchanan Circuit Court—HON. JOS. P. GRUBB,
Judge.

AFFIRMED.

Vinton Pike for appellant.

Allen H. Vories for respondent.

NORTON, J.—This is a proceeding in equity commenced

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in the circuit court of Atchison county to set aside and cancel a deed made by plaintiff to defendant, the petition also containing a count setting up a partnership in certain personal property and in farming operations, and praying that an account be taken and the said partnership settled. In the Buchanan circuit court, where the case was taken by change of venue and tried, plaintiff dismissed as to the second count in the petition, and the court rendered a judgment setting aside and cancelling the deed, and from this judgment defendant prosecuted his appeal to this court, and asks a reversal of the same mainly upon the ground that it is not sustained by the evidence.

The petition, in substance, charged that plaintiff and defendant are brothers; that plaintiff has been, all of his lifetime, sick, diseased, deformed and crippled, that his mental faculties were weak, and that he at all times confided in the defendant, trusting to and relying upon defendant to control and direct him in all his business relations; that for more than fifteen years he and defendant were partners in business, and as such partners owned an undivided half of the lands set out in said petition, upon which said lands plaintiff and defendant lived, and cultivated them as joint owners; that defendant managed and controlled the property, and plaintiff, trusting in defendant's superior judgment and business capacity and discretion, did whatever defendant advised or directed; that about October, 1872, the defendant, intending to cheat and defraud plaintiff out of his interest in said lands, and intending to appropriate the same to his own use and benefit, represented to plaintiff that from his weak mind and physical infirmities, he was incapable of properly owning or controlling said lands, and then and there falsely and fraudulently represented to plaintiff that one Sarah F. Crook, (now Sarah F. Journey,) a woman who was then living on part of the land of plaintiff and defendant, intended to bring suit for breach of marriage promise against plaintiff, by which he would be ruined, and his lands taken away

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from him, and that if he would save his lands he must make a conveyance of them to defendant, to hold for him awhile, and then he would re-convey the same to plaintiff; that plaintiff, relying upon and confiding in his said brother and in his representations aforesaid, and fully believing that defendant was advising him for the best in the premises, and having no will or judgment of his own, then and there conveyed by deed his interest in said lands to defendant, without any consideration therefor; that it was wholly untrue that the said Sarah F. Crook intended to prosecute any suit against plaintiff for breach of marriage promise, and it is wholly untrue that there had ever been any contract of marriage between said parties, or any foundation for any report thereof; that after said conveyance was made by plaintiff to defendant, he discovered the fraud which his brother had practiced upon him, and demanded of him a re-conveyance of said land, but that defendant has refused, and still refuses to make said re-conveyance, and now denies that plaintiff has any interest in said lands. The plaintiff then prayed for judgment that said deed be set aside and cancelled, and that plaintiff be re-instated of his one-half title in said lands, and for all proper relief.

The defendant answered, denying each and every allegation in said petition.

The evidence offered on the trial clearly established that plaintiff owned at the time of the execution of the deed sought to be cancelled, an undivided interest in the land mentioned therein, which, according to the weight of the evidence, was an undivided half interest, and that the land at the time the deed in question was executed, was worth from \$18 to \$25 per acre, thus making the half interest of the plaintiff of the value of from \$2,880 to \$4,000, there being 320 acres in the entire tract. The evidence also clearly established the fact that plaintiff was a cripple, diseased in his hips, and had been so from birth, and it tended to show that he reposed the utmost confidence in

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defendant, who was his brother, and that he was under his influence, control and direction; that his fears were operated upon by the story that designing persons were attempting to get his property, and that he was threatened with a suit for breach of marriage contract, for which, according to the evidence, there was no foundation in fact, and that the only safety for him was to convey the land to defendant.

Mr. Schooler, a witness for plaintiff, testified that plaintiff was crippled, deformed, and of weak mind, and Seth Hollway, a witness for defendant, and a brother of both parties, testified that it was understood in the family that plaintiff was not able to take care of himself, and would have to be taken care of, and that he would do whatever any of his brothers wanted him to do, and that he was easily influenced. Mac. Hollway, also a brother of the parties, testified that plaintiff had been a cripple all his life, had an impediment in his speech, and that defendant had control over him; that defendant told him that plaintiff had deeded the farm to him on account of apprehended difficulty with a woman who was threatening him with a claim for damages for breach of marriage contract; that witness told defendant that life was uncertain and that he ought to deed the land back or make it right with plaintiff, to which he replied he would make it all right as soon as the difficulty was over. Defendant did not pretend that he had paid anything for the land. Plaintiff, who was examined as a witness, testified that defendant kept after him to deed the farm over to him, on account of the woman threatening to get after him, and said he would deed it back to him when he asked him to do so; that there was no truth in the woman story; first demanded the deed back six months after he made it; that at the time he made the deed defendant gave him a note for \$500, but that the note was for his interest in the personal property on the farm, that nothing was paid him for the land,

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that the said note for \$500 had never been paid, and he tendered it to defendant in open court.

Defendant in his evidence stated that he bought plaintiff's interest in the said land and personal property on the place for \$500, and had given his note for that amount to plaintiff, which had not been paid, and that this constituted the consideration for the deed. There was other evidence relating chiefly to the personal property on the place, and as to what plaintiff's interest in it was, which it is unnecessary to notice, since the plaintiff dismissed the count in his petition having reference to it. Several witnesses expressed an opinion that plaintiff was competent to take care of himself, and had sufficient capacity to contract.

Under the rulings of this court in the cases of *Garvin v. Williams*, 44 Mo. 465; *Ranken v. Patton*, 65 Mo. 378; *Ford v. Hennessy*, 70 Mo. 580; *Cadwallader v. West*, 48 Mo. 483; *Bradshaw v. Yates*, 67 Mo. 221, the evidence above detailed fully warranted the court in rendering a decree cancelling and setting aside the deed in question. It shows that plaintiff trusted and confided in his brother, the defendant, and while the latter was vigorous in body and mind, the plaintiff was and always had been diseased in body and weak in mind, easily influenced, and was under the control of defendant; that the fears of plaintiff were operated upon by making him believe that he was in danger of losing his property from a cause which had no real foundation; that nothing whatever was paid or to be paid for the land, and that it was to be re-conveyed. As was said in the case of *Bradshaw v. Yates*, *supra*, "to give instruments executed under such circumstances countenance and support, would, in all cases where confidential relations exist, make the weaker party a victim to the rapacity of the stronger, and allow him to whom interests are confided for preservation and protection to appropriate them to his own use."

The court allowed plaintiff to dismiss the second count in his petition, and this action is complained of as being

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2. ———: practice, erroneous. The second count of the petition
civil: dismissal of one of the counts in the petition. sought a settlement of a partnership in personal property, while the first count sought to have a deed cancelled on the ground that it was obtained through fraud and undue influence. The causes of action stated in the two counts, were separate and distinct, and we think plaintiff was, therefore, properly allowed to dismiss the second count.

We are of the opinion that the judgment is for the right party, and it is hereby affirmed. All concur.

SUTTON, *Appellant*, v. CASSELEGGI.

1. **Married Woman's Deed.** A deed executed by a married woman without her husband, is void.
2. **Landlord and Tenant: REMAINDERS.** A lease for years by one who is tenant in fee as to one undivided half and tenant for life as to the other undivided half of the premises, is valid as against the remainderman entitled to the latter half during the life of the lessor.
3. **Adverse Possession: REMAINDERS.** The possession of a life tenant cannot be adverse to the remainderman.
4. ———. Though a deed be void, possession taken and held under it will be adverse as against the grantor and those claiming under him.
5. **Limitations: COVERTURE.** The statute of limitations does not run against a married woman during coverture, if she was under coverture when her cause of action accrued.
6. **Ejectment: PARTIES: LANDLORD AND TENANT: DAMAGES.** Tenants actually in possession, and not their landlord, are the necessary parties defendant to an action of ejectment. Under the statute, though, the landlord may, on his own motion, be joined as a defendant.

Where tenants occupy separate parcels of land under a common landlord, they should be sued separately. If, however, they are sued jointly and there is judgment against them, the error will be immaterial, if the judgment is for possession with nominal damages only; otherwise, if substantial damages are awarded.

In such case also there can be no recovery of substantial damages against a landlord joined as co-defendant with his tenants.

*Appeal from St. Louis Court of Appeals.***REVERSED.***Britton A. Hill* for appellant.*Cline, Jamison & Day* for respondents.

MARTIN, C.—This was an action of ejectment, commenced on the 2nd day of November, 1873, to recover a parcel of ground on Third street in block 63 of the city of St. Louis, containing a front of thirty-two and a half feet on Third street, by a depth of fifty-four feet. The defendants filed separate answers, putting in issue the plaintiff's title, and denying all joint possession or occupancy, and setting up the defense of the statute of limitations. Pauline Dalton, in her answer, avers that she is the owner of the lot of ground; that she rented the south half to Casseleggi, and the north half to Dolan, her co-defendants, who were in possession as her tenants at the beginning of the suit, and are still in possession as such tenants. The replication puts in issue the new matter of the answers, and contains a denial of ownership in said Pauline to any interest exceeding one-third thereof. The case was tried by the court without the intervention of a jury, and resulted in a judgment for plaintiff for an undivided one-eighth of the lot sued for, and for \$1 rents and profits, and \$1 monthly value. Both parties appealed to the St. Louis court of appeals. The judgment was there affirmed in all things. See 5 Mo. App. 122. From this judgment of affirmance the plaintiff has appealed to this court, and the errors, if any, made against him, come before us for correction. The defendants have abided with the decision of affirmance, and have prosecuted no appeal.

An agreed statement of facts took the place of much

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evidence, and as it has a controlling effect, as far as it goes, I will set it out.

Agreed statement of facts:

"It is admitted in the trial of the cause that Joseph Montaigne is the common source of title to the lot sued for, and owned the said lot in fee on the 8th day of June, 1818; that J. Baptiste Robidoux had disappeared for several years from his family and his home, and Rosalie Robidoux came from Canada to St. Louis with her daughter Archange, in the year 1817; that soon after Rosalie came to St. Louis, she being regarded as a widow, and her husband, Robidoux, as dead, one Lange Allard took her as his wife, and lived with her as such during the year 1818; and until J. Baptiste Robidoux appeared in St. Louis and claimed his rights as a husband, in the year 1819. Lange Allard left and went up to the mountains and died there within a few years. J. B. Robidoux lived with his wife Rosalie, in the city of St. Louis, from 1819 up to the time of his death in 1826. His widow, Rosalie, thereupon married Paul Morris, who died in 1832, and after the death of Morris the widow married Victor Chataigne in 1836, and they lived together as husband and wife until 1853, when he died, leaving said Rosalie, his widow, surviving him. Said Rosalie died the 18th day of October, 1858, leaving her last will, that was probated on the 21st day of October, 1858. Archange, her daughter, had married one McDowell, in 1836, and had issue of said marriage five children—Robert A., John B., Emily, Rosalie and Mary. Mary died in 1863, intestate and without issue. All of the surviving children of McDowell were of the age of twenty-one years in 1861, December 5th. Emily married Joseph W. Renfrow, in 1863, and Rosalie married James A. Maclay, in 1864. Archange McDowell died in 1871, intestate, and her husband died in 1864, intestate. Laurent Robidoux is still alive, and has eight children, who are all alive. The net rents, over and above taxes, were \$1,137 a year, prior to 1873, and \$937 a year since January 1st, 1873. The

said Mary McDowell was eighteen years and eight months old on the 6th day of December, 1861. The said Pauline Dalton has all the right, title and interest in and to said premises sued for which was vested in her husband, John Dalton."

Several conveyances were submitted by both sides, as well as oral evidence bearing upon adverse possession as vesting title under the statute of limitations in favor of plaintiff as well as defendants.

For the purpose of tracing down the record title from the common source admitted in the agreement, I will not notice deeds which have been justly held to be ineffectual to pass title by reason of defective acknowledgments or non-joinder of husbands. After ascertaining the record title transmitted to the claimants or their grantors, I will then consider to what extent the title so transmitted has been lost or divested by adverse possession.

Joseph Montaigne was the original owner of the premises. On the 8th day of June, 1818, he conveyed the lot to Lange Allard and Rosalie Allard, his wife. Rosalie Allard was not his wife, but was in truth Rosalie Robidoux, who had left her husband in Canada and was co-habiting with Allard as his wife. This deed gave the land to Lange Allard and Rosalie as tenants in common, Rosalie thereby becoming vested with one undivided half in fee, while the other half vested in Allard. In 1819, J. Baptiste Robidoux, her lawful husband, hunted up his wife Rosalie in St. Louis, claimed his marital rights, and lived with her till his death in 1826. Before the death of Robidoux, Lange Allard, who had given Rosalie back to him, conveyed, on the 8th day of June, 1818, the undivided one-half of the land to Horatio Cozzens as trustee for Rosalie for life, with remainders as to said half in fee to Laurent and Archange, son and daughter of Rosalie by Robidoux, her husband. At this date the title stood one-half in Rosalie in fee, the other half in her for life, with remainder in fee as to that half in Laurent and Archange, one-fourth in each undi-

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vided. Thus stood the title at the death of Robidoux in 1826. It remained unchanged in November, 1828, at which date Rosalie married Paul Morris, which fact is evidenced by a marriage contract of that date. He died in 1832. In 1836 Rosalie married Victor Chataigne, her third and last husband, with whom she lived till his death in 1853. The title remained unchanged at the death of Rosalie, which took place in 1858. It appears in evidence that by herself or tenants she had occupied the lot up to the time of her death.

She left a last will by which, after certain other devises, she willed all the rest and residue of her estate, one-third to Laurent, one-third to the children of Laurent, and one-third to the children of Archange. These two persons were her son and daughter. This will carried to the devisees all that she died seized of, viz: one-half undivided. As to the other half undivided she had possessed only a life estate, which terminated at her death. Thus her decease left the title, one-fourth in Laurent and one-fourth in Archange, which came to them from the deed of Lange Allard, made in June, 1821. The other half of which Rosalie had died seized in fee by virtue of her will vested, as to one-third of one-half or one-sixth, in Laurent, one-sixth in the children of Laurent, and one-sixth in the children of Archange. The devolution of the record title is very clear. No one could claim any part of this title except by deed, devise or descent from Laurent or Archange or the children of Laurent or Archange.

According to the statement of facts, Archange married one McDowell in 1836, and had issue five children—Robt. A., John B., Emily, Rosalie and Mary. Mary died intestate in 1863, without issue, leaving her brothers and sisters to inherit her share. Emily married Renfrow in 1863, Rosalie married Maclay in 1864, Archange, the mother, died intestate in 1871. Laurent is living with eight children, all alive.

The plaintiff submitted three deeds from three of the

four heirs of Archange, Robert, Emily and Rosalie, Jr., all made on the 13th day of April, 1873. These four heirs, as we have seen, acquired one fourth from the Allard deed, as heirs of Archange, and one-sixth from their grandmother's will. These three deeds from three of the four heirs gave to plaintiff three-fourths of the one-fourth coming from Allard, and three-fourths of the one-sixth coming by the grandmother's will, amounting to one-eighth, making in all fifteen-forty-eighths. There was no valid deed given in evidence taking any part of this title from the plaintiff or his grantors. The court of appeals held that as to the portion coming through the conveyance from Allard the title was lost by the statute of limitations, and allowed recovery only for the one-eighth coming by the will of Rosalie, their grandmother, and the plaintiff comes here by appeal, insisting that under the law and evidence he is entitled to have judgment for the three-fourths of the one-fourth denied to him by the circuit court and court of appeals, being nine-forty-eighths of the whole.

It is necessary for us to consider the facts relied upon by the defendant for defeating this portion of the plaintiff's title. But before doing this, I may as well call attention to the record title submitted in evidence by Pauline Dalton, the defendant. It consisted of a deed of trust by Laurent and wife to secure a debt of \$4,000, dated March 2nd, 1861, and the deed of the trustee to John Dalton, dated January 29th, 1862. This placed in Dalton the one-fourth acquired by Laurent from the Allard deed, also the one-sixth acquired by the will of his mother, which would be five-twelfths or twenty-forty-eighths of the whole. By the agreement in the case, Pauline Dalton is possessed of all the title acquired by John Dalton, which, as we have seen, amounted to twenty-forty-eighths. There remained five-forty-eighths outstanding in John B., the son of Archange, and eight-forty-eighths in the children of Laurent, none of whom are parties to this suit.

The facts of adverse possession relied on by defendants

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may be briefly recited. On the 16th day of November, 1820, Rosalie joined with her husband, Robidoux, in a conveyance of the whole lot to a trustee in trust for the separate use of herself for life with cross remainders in fee to Laurent and Archange, and their heirs. This deed was a nullity for want of a proper acknowledgment. *Little v. McDowell*, 33 Mo. 523. On the 5th day of December, 1829, Rosalie, joining with Paul Morris, her second husband, made a deed of the whole lot to a trustee to the use of Laurent. This was also a nullity for want of a proper acknowledgment in open court. On the 29th of the same month in 1829, Laurent and wife conveyed back the lot to a trustee to the sole use of Rosalie during life. This deed was also void for the same reason. These deeds left the estate in Rosalie unchanged. She continued to own one-half in fee, the other one-half for life, remainder to Laurent and Archange. She remained in possession of the property. But her children evidently considered her owning only a life estate by virtue of the void deeds.

In 1850, joining with Chataigne, her last husband, Rosalie executes a lease of the premises to Jesse Little for fifteen years from March 1st, 1850. Little entered into possession as her tenant. After the death of Rosalie, which took place in 1858, her two children, Laurent and Archange, claiming that the life estate upon which the lease rested was at an end, brought suit for possession against Little in the St. Louis land court, to the March term, 1859. On the 9th day of June, 1860, judgment was rendered for \$1,500 damages, and \$100 monthly rents. Laurent and Archange in this suit evidently regarded themselves as tenants in common as to the fee of the lot. Little died while the suit was going on, and his executor compromised the damages on the judgment, in 1861, which compromise left open the right of appeal. The appeal was duly proceeded with, and in the meantime the rents were collected from the tenants by John Maguire and paid over to Laurent and Archange. Matters remained in this

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condition till John Dalton foreclosed the deed of trust made by Laurent in March, 1861, heretofore mentioned. This foreclosure took place January 29th, 1862. This foreclosure gave him Laurent's title, whatever it might be. He took Laurent's place, and commenced by virtue of it, to receive his share of the rents and profits from Maguire, the collector, on the 1st day of May, 1862.

At the same time that Laurent made a deed of trust, March 2nd, 1861, Archange also made one. This deed of trust made by Archange was closed out on the 26th day of May, 1862, and John Dalton became the purchaser. After the second purchase he received from Maguire all the rents and profits on the strength of the two deeds of foreclosure in Laurent and Archange. But the deed of Archange passed no title, because she was a married woman at the time, and her husband, McDowell, did not join in the deed. It may be remarked in passing that the circuit court evidently accepted this deed as valid, and thereby denied to the plaintiff the Allard title. The court of appeals held the deed invalid, but denied the Allard title by virtue of a disseisin under the statute of limitations. The two courts came to the same judgment, but in different ways. Nevertheless Dalton, under the belief that it was good, received all the rents and profits of the property after its foreclosure, May 26th, 1862.

Thus matters remained until the appeal taken by Little's executors against Archange and Laurent in the ejectment suit was determined in favor of the lessee at the April term, 1863, of the Supreme Court, (33 Mo. 523). It was held on the appeal that the deed of November 16th, 1820, wherein Rosalie and her husband Robidoux, had undertaken to convey the land to a trustee to the use of Rosalie for life, with cross remainders in favor of Laurent and Archange, was void. This decision rendered the lease valid for fifteen years from May 1st, 1850, as being made by a person who had at least an undivided half of the lot in fee, besides a life estate in

1. MARRIED WOMAN'S DEED.

2. LANDLORD AND TENANT: remainders.

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the other half at the making of the lease. This decision was a very influential event in its effect upon the complicated and romantic title now in dispute. Immediately the heirs of Jesse Little, claiming under the lease, sued John Dalton in ejectment for the lot and for the rents and profits, on the 1st day of February, 1864. While this action was pending, John Dalton died, and his heirs and administratrix became parties to the suit. The term in the lease was established, but it had expired before judgment, and the Little heirs recovered a judgment for rents and profits only, which, in 1866, was paid by the Daltons.

The court of appeals properly held that the possession of Rosalie up to the time of her death in 1858, could not be adverse to the one-half given in remainder to Laurent and Archange. Her possession as life tenant was their possession. After her death Laurent and Archange took her place as to that half, and as if owners in fee of the other half, received the whole rents and profits.

Now, there is no pretense of adverse possession in Dalton prior to the foreclosure of the deeds of trust in 4. — January and May, 1862. By these deeds he claimed the whole estate, and for more than ten years received the rents and profits. Although the deed foreclosing the estate of Archange was void, he nevertheless received and enjoyed the rents and profits of the whole estate as if it was valid. The court of appeals holds, very properly as I think, that while this deed did not operate to transmit title, it played an important part in rendering his possession adverse. He held adversely to Archange and the children of Archange as to all they could sue for. They could sue for all that came to them from the Allard conveyance, in remainder after the death of Rosalie, the life tenant. Her outstanding lease would not be in the way of a recovery of such interest. As to the part given to the children of Archange, in the will of their grandmother, they could not sue on account of the

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outstanding term in her tenant, which did not expire till 1865. The one-half she acquired from Joseph Montaigne had passed by her will, one-third to Laurent, one-third to Laurent's children, one-third to Archange's children, subject to the lease.

The court held that as to that interest the possession of the Daltons was not adverse till 1865, which left the defendants outside of the statute of limitations, this suit having been brought in 1873. The plaintiff is satisfied with this ruling, and the defendant is not a complainant before us of any error in respect to it. When the courts below held that this possession of the Daltons was adverse as to that portion of the title of Archange and her heirs which came from the Allard deed, being a one-fourth interest, it was predicated upon the assumption that for ten years prior to 1873, Archange, in her lifetime, and her children after her death, could sue for their rights. The fact, however, is clear on this record, that Archange was a married woman, and that the saving clause of the statute preserved her right unimpaired. The agreed statement recites that Archange married McDowell and had by him the children from whom plaintiff holds deeds. It also recites that Archange died in 1871, intestate, and her husband died intestate in 1864. She was, therefore, under coverture between May, 1862, when it is claimed the Dalton title became adverse, and 1864, when her husband died. The statute did not run against her during those two years; and a deduction of these two years leaves the defendant with only nine years of adverse possession. It follows from this that upon the record of the case, the plaintiff ought to recover for the rest of the title to the children of Archange, which vested in him by his deeds, being nine-forty-eighths of the same, making in all fifteen-forty-eighths of the whole.

It is urged by respondent here that the question whether Archange McDowell was a married woman March 2nd, 1861, when she executed the deed of trust which was

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foreclosed in Dalton's favor, was not raised in the circuit court. In the court of appeals, Archange was treated as a married woman, when she made the deed. It was regarded as void for the purpose of transmitting title, and took its place as a fact among the facts of adverse possession. It would be illogical and contradictory to hold that her coverture avoided her conveyance to Dalton, but that it was unavailing to save her estate from his claim of right by adverse possession; while the law is as explicit in saving her right to sue during coverture, as in avoiding her sole deed, made during coverture. Moreover, her coverture, recited in the agreed statement, is properly within the scope and terms of the sixth instruction given at the instance of defendants, in which it is declared "that if the defendants, and those under whom they claim, have had the quiet, peaceable, continuous and adverse possession of the premises in dispute, since March or April, 1861, then the said plaintiff is not entitled to recover." I do not think the fact of coverture can be brought into the case without giving to it its full effect on the title by adverse possession as well as by deed.

It is unnecessary to examine the instructions in the case. They are declarations relating to the deeds or possession, which are disposed of in our decision upon the title and the extent and effect of adverse possession. The plaintiff has a great number of instructions applying to the long possession of Rosalie, by virtue of which he claimed the fee simple to the whole property. In view of the fact that his replication seems to concede a portion of the title in defendants, these instructions are out of place in this case.

The plaintiff insists that he was entitled to a judgment for the admitted rents and profits, and that the court erred in rendering a judgment for only nominal damages. This point is not noticed in the decision of the court of appeals.

An action in ejectment must be brought against the

5. EJECTMENT: parties: landlord and tenant: damages.

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actual occupant of the property. The landlord of the occupant is not a necessary party. Our statute permits him to come in and defend. It has been said that he possessed this right at common law, prior to any statute. *Fosgate v. Herkimer Man'fg Co.*, 12 N. Y. 580. The plaintiff sues the defendants, alleging them to be in joint possession. In their answers they deny the averment of joint possession. Dolan pleads that he is in sole possession of the north half of the lot, and has no possession of the south half. Casseleggi pleads that he is in sole possession of the south half, and has nothing to do with the north half. Pauline Dalton pleads that she is not in actual possession of either parcel, but that she rented the north half to Dolan, and the south half to Casseleggi, who occupy as her tenants. The evidence developed at the trial shows that these pleas were literally true. When this fact was developed it was apparent the plaintiff had made a misjoinder of parties defendant. Distinct actions ought to be brought to recover distinct and separate possessions. *Keene v. Barnes*, 29 Mo. 377; *Walsh v. Varney*, 38 Mich. 73; *Fosgate v. Herkimer Man'fg Co.*, 12 N. Y. 585. The plaintiff ought not to have been allowed to proceed with two distinct actions of ejectment in one. It not appearing in the petition, the defendants cannot demur for the misjoinder.

It seems to me the defendants brought the matter up properly in an instruction that the plaintiff could not recover as long as he persisted in proceeding in this way. But Judge Scott intimates in *Keene v. Barnes*, that the proper method of taking advantage is by motion to compel the plaintiff to elect as to which cause of action he will proceed with. The instruction that plaintiff could not recover ought to have been treated, to say the least, in the nature of a motion to elect. The instruction was refused and judgment went for plaintiff, but for only nominal damages.

The error of this practice, as it stands on the record, is not a material one against the defendants, as to the re-

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covery of possession from them. Whether their possession is joint or several, the single writ for possession will be the same thing against them in effect as if two writs issued, one against each. Neither is called upon to respond for rents and profits received by the other. No substantial injustice can accrue to them by reason of this error of the proceeding. But when the plaintiff asks for a joint judgment against them for rents, the injustice at once appears. Dolan would be paying the damages assessed for an ouster from a tenement he had nothing to do with. And the same thing would happen to Casseleggi. The agreed statement of the rents and profits relating to both lots, does not help the plaintiff out. It fails to show how much ought to be accounted for by Dolan, and how much by Casseleggi, for the two stores occupied by them separately. As for Pauline Dalton, she defends only as landlord. She ought not to be called to respond for rents and damages which the court is unable to assess against her tenants as the actual occupants of the land. The plaintiff must take the necessary consequences of his violation of the proper method of procedure, in the loss of his rents and profits. He will have to be satisfied with getting his title through in the face of such irregularity.

So far as the adjudication and recovery of his right of possession is concerned, we allow the judgment to stand, because the error is immaterial and works no injustice. But we could not recognize it as applying to the rents and profits without sanctioning an injustice resulting from a violation of our methods and forms of procedure. If the action was in the nature of an equitable ejectment, we might consider the propriety of giving a decree of accounting for the rents and profits.

The conclusion we have reached upon the whole case is, that according to the evidence in the record the plaintiff was entitled under the law to recover the additional ninety-fourth-eighths of his record title, but that he was not entitled to a judgment for rents and profits beyond a

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nominal sum. The misjoinder of parties defendant does not work any material injury so far as the recovery of possession is concerned, but it would result in great prejudice to the defendants to allow the damages to be assessed as prayed for by plaintiff. The judgment as rendered in the circuit court might be corrected by substituting fifteen-forty-eighths for one-eighth, as therein recited. But we think it best to reverse the judgment of the court of appeals and the judgment of the circuit court, and order the circuit court to enter a new judgment in the place of the old one, in all respects similar to it, except as to the amount recovered, which in the new judgment will be fifteen-forty-eighths of the premises sued for.

The other commissioners concurring, the judgments of the court of appeals and the circuit court are reversed, and the circuit court of the city of St. Louis is ordered to enter up a new judgment in conformity with the directions of this decision.

BLESSING, *Plaintiff in Error*, v. THE ST. LOUIS, KANSAS CITY
& NORTHERN RAILWAY COMPANY.

Master and Servant: RAILROAD: NEGLIGENCE. In an action against a railroad company to recover for the death of a locomotive engineer killed while on duty, through the negligence of the train dispatcher, the plaintiff failed to show that the train dispatcher and the engineer were not fellow servants. *Held*, that for this omission the plaintiff was properly non-suited.

Error to St. Louis Court of Appeals.

AFFIRMED.

A. R. Taylor for plaintiff in error.

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Wells H. Blodgett and Prosser Ray for defendant in error.

HENRY, J.—This is an action by which plaintiff seeks to recover the statutory penalty of \$5,000 for the death of her husband, Chas. W. Blessing, which occurred under the following circumstances :

Blessing was an engineer in the employment of defendant, and, on the morning of the 28th of November, 1877, left Moberly in charge of his engine with a train of which one Austin was conductor. West of Moberly, at coal mine No. 2, they passed a work train under the charge of one Johnson. At mine No. 2 there were side-tracks, but there was no telegraphic communication between mine No. 2 and Kansas City, the western terminus of defendant's road, or Moberly, or any other station on the road, which fact was known to Blessing. Austin's train went to Brunswick, forty miles west of Moberly, and at three o'clock that same afternoon, Austin and Blessing started back to Moberly on another train, an extra. Before reaching Huntsville, a station six miles west of Moberly, and two miles west of mine No. 2, they received an order from the train dispatcher at Kansas City to run to Moberly, avoiding regular trains, and to look out for Johnson between mine No. 2 and Huntsville. They arrived at Huntsville, and after whistling as many as twenty times to notify Johnson, they pulled out for Moberly, and when going around a curve, between Huntsville and mine No. 2, without sending flagmen ahead or taking any other precaution to avoid a collision with Johnson's train, except to run their train at a slow rate of speed, six miles an hour, the trains collided with each other about 5:40 o'clock p. m., and Blessing was killed.

Johnson testified that he had no orders in regard to this extra train, and that he should have been notified of it; that his waiting orders were between Huntsville and

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mine No. 2, avoiding regular trains, flagging against two extras going west; that he was running at a speed of twenty miles an hour, when he was apprised of the approach of Austin and Blessing's train by sparks from the smoke stack; that he whistled for brakes, had the tender brake set, reversed the engine full stroke, and threw the throttle wide open, and that his engine was running at a speed of ten miles an hour when the collision occurred.

The court gave an instruction to the effect that on the evidence plaintiff could not recover, and that presents the only question for consideration.

Evidently the injury to plaintiff was mainly, if not entirely, occasioned by the neglect of the train dispatcher at Kansas City to notify Johnson of Austin's extra train, if such was his duty. If it was his duty, Austin and Blessing had a right to act on the supposition that such notice had been given, and would not be held to the same care as if they had known it had not been given, or that no such duty rested upon the train dispatcher. If Johnson had known that Austin's train was coming east, and had run as cautiously as Blessing was running, six miles an hour, the collision would not have occurred, if he had used the same precautions to avoid it which he did employ when he discovered Austin's train. He could, and probably would have discovered the approach of that train at the same point as when running twenty miles an hour, and it is in proof, that after he discovered Austin's train, he reduced the speed of his train from twenty to ten miles an hour.

Whether Austin and Blessing were prudently running their train, is to be determined from all the facts and circumstances of the case, and inasmuch as we cannot, on the evidence, say they were not managing their train prudently, there would have been error in the instruction given, but for another question involved. If the death of Blessing was occasioned by the neglect or carelessness of a fellow servant, the defendant is not liable; and in *McGowan v. St. L. & I. M. R. R. Co.*, 61 Mo. 528, this court,

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HOUGH, J., delivering the opinion, said: "*Prima facie*, all servants of a common master employed in running, operating and rendering service with a train of cars, are fellow servants." The train dispatcher, it seems from the meager evidence on the subject, preserved by the bill of exceptions, controls the movements of trains, and the conductor has far less discretion than he as to when he shall start, where he shall stop, and how he shall run his train. It was observed in the case of *McGowan v. R. R. Co.*, *supra*, that "if there are facts which show that this relation (that of fellow servant) does not really exist between all of such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation." No such testimony was offered on the trial of this cause, and the failure on the part of the plaintiff, by testimony, to show that Blessing and the train dispatcher were not fellow servants warranted the instruction given by the court, and for that reason the judgment is affirmed. All concur.

BAIER V. BERBERICH *et al.*, Appellants.

Case "Involving Title to Real Estate:" APPEAL. Where the petition asserts a trust in plaintiff's favor in respect to lands held by defendant, and prays that the title to the lands be divested out of defendant and vested in plaintiff, the case is one "involving title to real estate" within the meaning of section 12, article 6 of the constitution, and an appeal lies from the St. Louis court of appeals to the Supreme Court.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

J. M. & C. H. Krum for appellants.

Kehr & Tittman for respondents, cited *Smith v. Bryan*, 34 Ga. 61; *Umbarger v. Watts*, 25 Gratt. 167; *Hancock v. R. R. Co.*, 3 Gratt. 328; *Hutchinson v. Kellam*, 3 Munf. 202; *Skipwith v. Young*, 5 Munf. 276; *Hatch v. Allen*, 27 Mo. 85.

MARTIN, C.—This was a suit in equity commenced in the circuit court of St. Louis on the 17th day of August, 1878. The bill in substance charges that on and prior to the 22nd day of May, 1877, John T. Baier was the owner of two adjoining lots and the building thereon in the city of St. Louis, subject to a deed of trust on each; that one of the lots with its improvements was worth \$12,000, and the other \$7,000; that Baier, being embarrassed and no longer able to meet the interest on the incumbrances, it was arranged that the property should be permitted to go to sale under the deeds of trust, and that Sebastian Berberich should bid it in for the benefit of the plaintiff Louisa; that an amount sufficient to satisfy the bid should immediately be borrowed on the security of the property itself, and the title be vested in the plaintiff Louisa, for her sole and separate use; that both lots were advertised for sale under the deeds of trust, for different days, and that relying upon the assurances of the senior defendant, the plaintiff abstained from any effort to secure competition at the sales; that the defendant John C. Berberich was fully aware of all the facts; that both defendants, before and at the sales, made known that the property would be bought in for the plaintiff Louisa; that they made and caused statements to that effect to be made to persons known or supposed to be desirous of buying, and asked the co-operation of plaintiffs and of others to prevent competition at the sales; that persons desirous of buying, upon learning that the purpose was to bid in the property for the plaintiff Louisa, refused to attend or compete at the sales; that Sebastian Berberich became the purchaser of the property without competition at the trustee sales, but instead of taking the bids

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in his own name, caused them to be entered in the name of his son, the defendant, John C. Berberich, a young man without means or credit, and directed the deeds to be made to him; that both defendants, until the time of the second sale, and for some time thereafter, recognized the assurances under which they had been permitted to buy the property, but subsequently denied them and refused to carry them out; wherefore plaintiffs aver that the conduct of defendants constituted a gross fraud upon the rights of plaintiff Louisa, and that in consequence thereof, the defendant John C. Berberich holds the title so acquired in trust for her, and they pray the court to so declare and decree, and to divest said title out of said defendant and vest the same subject to the said two deeds of trust in a trustee for the sole and separate use of the plaintiff Louisa, and to order and adjudge the defendant John C. Berberich to execute the necessary deed or deeds to vest said title as herein prayed for, and for such other and further relief in the premises as may be just and proper.

The answer put in issue all the equity alleged in the bill.

In the circuit court the bill was dismissed after trial on its merits. The plaintiff thereupon appealed to the St. Louis court of appeals. That court, after a review of the evidence, decided that the plaintiff had made out a case of constructive trust against the defendant, and reversed and remanded the case to the circuit court for another trial. The defendant filed a motion for a rehearing, and the case was reviewed again by the court of appeals, and the judgment of reversal permitted to stand. From this action of the court of appeals the defendants have brought the case here for review.

The plaintiff objects that the decision of the court of appeals is final, and that this is not a case within the meaning of the constitution, which authorizes an appeal to the Supreme Court from the court of appeals. The 12th section of the 6th article of the constitution saves to

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the parties the right to appeal to the Supreme Court "in cases involving title to real estate." The plaintiff refers to decisions of the Supreme Court in which it has been held that suits on special tax-bills and mechanic's liens do not, within the meaning of this clause, involve title to real estate or admit of an appeal to the Supreme Court. *State ex rel. Haeussler v. Court of Appeals*, 67 Mo. 199. The case contained in this record does not fall within the class of cases involving the enforcement of liens and tax-bills and the foreclosure of mortgages, in which the sole object of the proceeding is to subject the admitted title of real estate to liens and demands, and to enforce them against it by process. The immediate object of this proceeding is to take out of the defendant the title to real estate which he claims to be his, and to vest it in the plaintiff, by virtue of a constructive trust, which imposed on him the duty and obligation to convey it to the plaintiff. The plaintiff asks that he be compelled to execute a deed conveying the land to plaintiff. He denies the trust, duty or obligation to convey, and claims that the title should remain as his absolute property. If a suit of this kind does not involve the title to real estate, it would be difficult to define a case that does involve it. The cases cited by plaintiff's counsel from the Georgia and Virginia reports did not have for their immediate object the divestiture of title, and for that reason they cannot be considered as bearing upon the point in issue.

The case being properly here on appeal, the action of the court of appeals in reversing the judgment comes before us upon the evidence as in all equity cases. We have read the evidence in the case, and in our judgment it sustains the equities of the bill. *Baier v. Berberich*, 6 Mo. App. 537. See also decision of court of appeals on motion for rehearing, in the record. The decision of the St. Louis court of appeals upon the facts of the case—reversing and remanding the cause—meets with our approval, and we affirm its action for reasons therein stated. All concur.

RUSSELL, *Plaintiff in Error*, v. BERKSTRESSER.

1. **Practice: ORDER OF PROOF.** The order of proof is largely within the discretion of the trial court. It is not error to receive evidence of a parol agreement concerning land before any evidence is given of the acts of performance relied upon to meet the objection that, under the statute of frauds the agreement must be in writing.
2. ———: **VARIANCE: PLEADING.** An answer construed and held to plead a parol agreement between the parties: by plaintiff, to cancel defendant's notes given upon the purchase of land: by defendant, to surrender possession of the land to the plaintiff: and a performance by defendant of his part of the agreement. Evidence examined and held not to be at variance with the pleading.
3. ———. An answer alleged that in pursuance of an agreement by plaintiff to cancel defendant's notes, and by defendant to surrender the possession of certain premises, defendant permitted plaintiff to take possession thereof, and to have the improvements and betterments. *Held*, that the answer contained an indirect allegation that it was part of the agreement, that plaintiff should have the improvements, and that under such allegation it was competent to show that there were improvements, and the character of them.
4. **Statute of Frauds: PERFORMANCE OF PAROL CONTRACT.** In a suit upon notes given by defendant to plaintiff for land, afterward sold under a power of sale contained in a mortgage securing payment thereof, and bid in by plaintiff, it is a good defense to establish a parol agreement by the plaintiff to cancel the notes in consideration that defendant surrender to plaintiff the possession of the land, and a surrender and acceptance of possession in pursuance of the agreement.
5. **Practice, Supreme Court: CASE IN EQUITY: EQUITY OF REDEMPTION: EVIDENCE.** In a suit upon notes given by defendant to plaintiff for land, which, the notes being due and unpaid, the plaintiff sold in virtue of a power of sale contained in the mortgage securing the same, and bid in for himself through the intervention of a third party, the defense was an executed parol agreement on the part of the defendant to surrender the possession of the land, and to waive and surrender all right of redemption, in consideration of the cancellation of the notes. *Held*, that the equity of redemption involved did not make this an equity case: and being an action as at common law, the Supreme Court would not weigh the evidence.
6. ———. The Supreme Court will not reverse on the ground that, in an action as at common law, a verdict is against the weight of evidence, where there is not an absolute failure thereof.

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7. **Vendor and Vendee:** EXECUTED CONTRACT: CONSIDERATION. The surrender of the possession of real estate by the vendee and its acceptance by the vendor, will be held to extinguish the vendee's liability for the purchase money, where such was the agreement between the parties.

Error to Cass Circuit Court.—HON. NOAH M. GIVAN, Judge.

AFFIRMED.

Bogges, Cravens & Moore for plaintiff in error.

Adams & Sherlock and Comingo & Slover for defendant in error.

WINSLOW, C.—This is an action on three promissory notes executed by defendant to plaintiff, each for \$450, all bearing the same date, but payable at different dates, with compound interest at ten per cent, with a credit indorsed on the one first maturing of \$168.

The answer, after a general denial, and the statement that the notes were executed solely in consideration of the purchase money of certain land, states: "That on the 29th day of July, 1873, the date of said notes, plaintiff executed to defendant a conveyance of said real estate, whereby the said plaintiff covenanted with the defendant that he, the plaintiff, was seized of an indefeasible estate in fee simple of, in and to the premises aforesaid. (Here follows the statement of an agreement, of which there was no evidence.) That after said notes became due, the said plaintiff advertised and sold said land by virtue of the power contained in a mortgage executed by said defendant to said plaintiff at the date of said notes, and at such sale, one J. P. Barron, by the connivance and procurement of said plaintiff, bid in said land for the benefit and for the use of plaintiff only, and it was then and there agreed by and between said plaintiff and defendant that if he, the said defendant, would surrender to plaintiff the possession of the said premises and permit him, the plaintiff, to oc-

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copy the same, that he would cancel said notes, and release defendant from any further liability thereon, as was originally understood and agreed; and in pursuance of said several agreements, defendant did permit plaintiff to enter upon and take possession of said premises, and enjoy the rents and profits thereof, and have the improvements and betterments, and waived and surrendered to plaintiff the right to redeem said premises from the sale under said mortgage."

The reply to this answer, after a general denial, alleges: "That the contract and agreement alleged in said answer to have been made between plaintiff and defendant, by which said defendant was to surrender and deliver to plaintiff possession and all his right, title and interest in and to certain land in said answer mentioned, was made by parol and not in writing."

There was a trial by jury, which resulted in a verdict and judgment for defendant, to reverse which the plaintiff brings the record to this court by writ of error.

On the trial, the defendant offered himself as a witness, and offered to prove certain facts, to which plaintiff objected, the court overruled the objection, the testimony was admitted, and plaintiff excepted. This action of the court constitutes a preliminary question to be first considered. This testimony is as follows: "Some ten days, or more, prior to the sale of said land under a mortgage by said defendant to said plaintiff, which sale occurred on the 26th of November, 1877, he, said defendant, met the plaintiff at his house in Pleasant Hill, and it was then agreed, by and between said plaintiff and said defendant, that said plaintiff should, at such mortgage sale, purchase said land or have the same purchased for himself; that defendant should surrender the possession of said land, with all the improvements and the payments made thereon, and that said plaintiff would surrender to defendant or cancel said notes; that about thirty days after the occurrence of said mortgage sale, defendant met plaintiff at the town of

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Pleasant Hill, and it was then agreed by and between said plaintiff and defendant, that plaintiff might, at his own pleasure, take possession of said land, in accordance with the former agreement, and that said plaintiff would surrender said notes to defendant—plaintiff said all right—or, cancel them; that thereupon defendant abandoned the possession of said land, and plaintiff afterward took possession of the same; that since he bought said land and took possession thereof in 1873, he had made a quarter and a half-quarter of a mile of fence thereon, and had seeded fifteen acres thereof in timothy.” As to the first two statements above quoted the objections were: “Because no such contract was pleaded by defendant in his answer; because the alleged agreement was concerning the sale of land or some interest therein, and is shown to be by parol only; and because there was no sufficient consideration for said alleged agreement, as shown either in defendant’s said answer or by said evidence.”

The last two objections are clearly untenable. The very purpose of the testimony was to obviate the objection that the contract was not in writing, and to show a state of facts tending to relieve it from the operation of the statute of frauds. Unless the defendant was permitted to show the contract and its terms, he could not proceed to show the acts of performance relied on to relieve it from the statute, and that would end his case. He was not bound to show acts of performance as the first step in his proof. The order in which testimony shall be introduced is largely within the discretion of the trial court. *Powell v. Hannibal & St. Jo. R. R. Co.*, 35 Mo. 457; *State v. Daubert*, 42 Mo. 239. There was no abuse of this discretion in this case.

The objection, that no such contract was pleaded in the answer, was evidently based on a misconception of the answer. That portion of the answer commences with the allegation that “after the notes became due,” the plaintiff advertised the land under

1. PRACTICE: order of proof.

2. — variance: pleading.

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the mortgage, and bid it in for his own benefit, through the intervention of one Barron. Here, then, is a period of time stated commencing with the maturity of the notes, covering the advertisement of the property, the sale and the perfection of the title in plaintiff, through Barron. Then follows the allegation, in close connection, that "it was then and there agreed," etc. There is no warrant for saying that "then and there" means on the day of the sale. It is more natural and liberal to construe it as referring to the period of time during which the preceding events were transpiring, covering a period before and after the sale, because it may be inferred that the intervention of Barron caused some delay in perfecting plaintiff's purchase. Evidence of a contract initiated prior to the sale, a purchase by plaintiff at the sale, and a subsequent re-statement of the same contract, was not in contradiction of the answer, but tended to prove its allegations. The contract was the same whenever made, and the supposed discrepancy relates only to its date, which is not specifically alleged in the answer. Moreover, it will be observed that the last conversation testified to had reference to the surrender of the possession and the notes, under a preceding contract to that effect, and not to a new contract then made. Right in that connection the defendant testifies that he thereupon "abandoned the possession of said land, and plaintiff afterward took possession of the same." This evidence was admissible as tending to show performance.

As to the objection to the testimony concerning the fence and seeding the land, based on the ground that it is — was irrelevant and incompetent under the pleadings, and not alleged in the answer as a consideration for the contract, it is sufficient to call attention to the answer, wherein it is alleged that "in pursuance of said several agreements," which includes the one in question, defendant permitted plaintiff to "take possession of said premises, and enjoy the rents and profits, and have the improvements and betterments." Here is an indirect alle-

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gation that it was a part of the contract that plaintiff should have "the betterments and improvements," under which it was competent to show the character of the improvements. If there had been no improvements, counsel would have been swift to show the fact in support of their case, and as contradicting defendant. The existence of improvements was a very material part of defendant's case, there was sufficient in the answer to justify the admission of evidence on the subject, and the court committed no error in permitting it to be introduced. Its absence would have seriously embarrassed defendant's case.

Defendant, in addition to the testimony above quoted, gave evidence tending to show that when he went to see plaintiff at Pleasant Hill, on the first occasion stated, it was for the purpose of paying him another note, not in any way connected with those in suit, which he did pay off; and also for the purpose of making the arrangement about the notes in suit, as already stated; that the only acts of ownership he had ever known plaintiff to exercise over the land, since defendant abandoned it, was in May or June, 1878, when he saw plaintiff ride over it and drive off some cattle; that he again saw plaintiff riding over the land on horseback in the fall of the same year, and that at the time he saw plaintiff riding over the land, the fences were down and removed in places, so that any one could go on it without obstruction. It was admitted that the notes sued on were given solely for the purchase money of the land; that plaintiff sold the land as mortgagee, and Barron purchased it for him at \$8 per acre, and that Barron has since conveyed it to plaintiff, pursuant to said arrangement.

The plaintiff, in his own testimony, admits the first conversation at Pleasant Hill, but says it concerned the payment of another note, and that no such arrangement as that testified to by defendant was made or talked of; that there was no such conversation or arrangement, after the sale, as that testified to by defendant, and that there

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never had been any such conversation between them, at any time or place. Plaintiff further testifies that he had "never been on or seen said land from the time of the sale thereof to defendant, in 1873, until about May or June, 1878, after said mortgage sale; that about the date last aforesaid he passed over said land on horseback, found the fences down and some cattle pasturing thereon, and drove said cattle off said land; that about the time of so driving said cattle off said land, he learned from one Lamb, who lived in a school-house near by said land, that said cattle belonged to said Lamb; that he thereupon employed said Lamb to repair said fences on said land, and agreed to allow said Lamb to pasture his cattle thereon; that he was not again on or to see said land until in the fall of 1878, when he again rode over said land on horseback. These are the only acts of ownership, or of possession he has exercised over said land since he first sold and conveyed the same to defendant in 1873, save only that he has paid the taxes thereon since said mortgage sale; that he has so paid said taxes, and did these acts of ownership and possession of and over said land, solely because he thought and believed that, having purchased said land at said mortgage sale, as before stated, he had thereby acquired the title thereto, and had a right to the possession thereof, and the right to enter thereon."

Plaintiff introduced a witness who testified to a conversation with defendant, in the fall of 1876, in which defendant said he had paid plaintiff all he ever intended paying him on the land; also another witness who testified to a conversation with defendant, at the house of witness, on the day of the sale, in which defendant's liability on the notes was mentioned, in which the latter said nothing about the contract now relied on, but suggested an act of the legislature, which he supposed to have been passed, as a probable means of relief.

This was all the testimony in the case. The court gave the jury two instructions—the first quoted, at the

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instance of defendant, and the last of its own motion—as follows :

“If the jury believe from the evidence that plaintiff, at any time pending the advertisement of said land for sale under plaintiff’s mortgage, or at any time after said sale, agreed with defendant, that if he would surrender to plaintiff the possession of said land so sold by plaintiff, that he, plaintiff, would cancel or surrender to defendant the notes sued on in this cause, and in pursuance of said alleged agreement defendant surrendered, and plaintiff took possession of said premises, then the jury will find for defendant on each count in the petition.”

“The jury are instructed that they ought to find for the plaintiff in this cause, unless they shall believe from the evidence that said defendant and said plaintiff did make and enter into the agreement alleged by defendant in his answer, that said plaintiff would, in consideration of defendant’s surrendering the land mentioned, surrender to said defendant the notes sued upon, and in pursuance of said alleged agreement defendant surrendered and plaintiff took possession of said premises; and it devolves upon defendant to make out and support the existence of the alleged agreement and possession thereunder by a preponderance of evidence; and in weighing the evidence the jury should take into consideration all the facts and circumstances, acts and conduct of the parties as detailed in evidence.”

The plaintiff asked the following instruction, which the court refused :

“The jury ought to find for the plaintiff in this case, unless they shall believe from the evidence that defendant and plaintiff did make and enter into the contract alleged in defendant’s answer, in writing, that plaintiff would, in consideration of defendant’s surrendering to him the land mentioned in the pleadings, surrender to defendant the notes sued upon in this cause; or, unless the jury shall further believe from the evidence that plaintiff and de-

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defendant made and entered into such contract or agreement, not in writing, as alleged in defendant's answer, and that by reason thereof, and under and pursuant thereto, defendant surrendered, and plaintiff took possession of such land, as part performance of such alleged agreement; and not by reason of any claim or right under the mortgage sale or deed from Barron to plaintiff. And the jury are further instructed that, in this case, it devolves upon defendant to make out and support the existence of said alleged agreement, and that said plaintiff did take possession of said land under and pursuant thereto, and by reason thereof, by a preponderance of the evidence. And in weighing the evidence, the jury should take into consideration all the facts and circumstances, acts and conduct of the parties, as detailed in the evidence."

It must be apparent from an examination and comparison of these instructions, the two given and the one refused, that they are alike in material substance, the only real difference being in phraseology. The expression of the one refused, that the contract must have been in writing, or the other facts must have existed, is made the apparent ground-work of those given. In fact the entire defense was based on an executed parol contract, and there was no necessity for telling the jury anything about a contract in writing. There is no perceivable difference, in legal effect, in any other part of these instructions. Where instructions are given which correctly declare the law, it is not error to refuse others on the same subject, which, also, properly declare the law. *Whetstone v. Shaw*, 70 Mo. 575; *Anthony v. Bartholow*, 69 Mo. 186; *State v. Gann*, 72 Mo. 374; *State v. Walton*, 74 Mo. 270; *Martin v. Smylee*, 55 Mo. 577.

In *Pratt v. Morrow*, 45 Mo. 404, a case with which both sides to this controversy seem satisfied, Bliss, J., delivering the unanimous opinion of the court, says:

4. STATUTE OF
FRAUDS: performance of parol contract.

"It is certain that an unexecuted parol agreement to rescind, if a nude pact, cannot be

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enforced; but if executed, courts will not inquire into the consideration nor disturb the condition in which parties have voluntarily placed themselves. It is also true that a present indebtedness can in general only be discharged by payment, accord and satisfaction, or release under seal; yet when a contract of sale is actually rescinded, the restoration and acceptance of the property should be held to satisfy the obligation for the purchase money. If the vendor agrees to take back what he has sold, and cancel the debt, it is an accord, and if he actually takes it back, it is a satisfaction. But there is a broad distinction in this regard between an executed and an executory agreement. While an executory parol agreement, without new consideration, cannot be enforced, yet if the agreement be executed the act is a bar. Thus, while a mere verbal promise, after breach, to cancel a contract of sale would be no defense to an action upon it, yet if the contract be actually canceled and the property surrendered, it is at an end, and the formality of a sealed release is wholly unnecessary. The effect of such an executed agreement is the same, whether the contract be sealed or otherwise. The obligation, though it has become a subsisting debt, is discharged by the acts rather than agreement of the parties."

The questions of fact involved were submitted to the jury under proper instructions, there was a conflict of evidence as to the existence of the agreement, and the time and fact of its execution, there was evidence to sustain the verdict, and this court cannot, under its rulings, interfere with the verdict, whatever may be thought of the weight of evidence.

Counsel now suggest that this is an equity case, although they tried the issues as issues at law, and insist that we should examine the case on the merits. We are not inclined to accept this view of the case. The action was on notes for the purchase money of land, the defense was an executed parol contract of rescission of the sale of the land, under which

5. PRACTICE, SUPREME COURT:
case in equity:
equity of redemption: evidence.

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the notes were to be given up and canceled, and the possession and improvements of the land surrendered, and the reply was the statute of frauds, alleging that the contract concerned an interest in land and was not in writing. True, the interest involved was an equity of redemption, but the pleadings raised no equitable issues. In the case just cited, where the issues were similar, Bliss, J., referring to the conflict of testimony, says: "But, inasmuch as the issue of fact has been passed upon by the jury, we will not weigh the evidence, but only consider the questions of law involved." These remarks are applicable here.

We cannot say that there was an absolute failure of evidence. Even on the question of the execution of the a. — contract before the institution of this suit, if that should be considered material, plaintiff testified that he had paid the taxes on the land "since said mortgage sale." Defendant testified that he abandoned the possession and improvements immediately, and that plaintiff thereafter took the possession. Other evidence was to the effect that plaintiff did not go upon the land in person until May or June, 1878, which was after the commencement of this suit, and the plaintiff testified that all the acts of possession done by him, including the payment of taxes, were in pursuance of his purchase; but there was evidence of a contract under which these acts might have been done; and it was the province of the jury to draw the proper inferences from the facts. Payment of taxes is an act of ownership, and is competent evidence tending to show possession, although not alone sufficient for that purpose. When defendant abandoned the possession and improvements, the legal seizin of plaintiff drew to it the possession, and he was in constructive possession from that time. These are elementary principles. Defendant executed the contract on his part, so far as he could; according to his testimony, the plaintiff commenced the exercise of acts of ownership over the land at the time of the sale;

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and it was for the jury to find, from these and other facts before them, when the contract was executed.

Counsel for appellant insists that there was no consideration for the contract, and that it was a nullity; but in *Pratt v. Morrow, supra*, it is said that if the contract be executed, "courts will not inquire into the consideration, nor disturb the condition in which parties have voluntarily placed themselves." And, again, that when the contract "is actually rescinded, the restoration and acceptance of property should be held to satisfy the obligation for the purchase money." It thus appears that the question of consideration is not involved, the question being, has there been an actual rescission and a restoration and acceptance of the property. This question, as we have shown, was properly submitted to the jury, and the verdict must be held conclusive.

We have considered this case on the theory presented by counsel for appellant, for the purpose of showing that the court properly submitted the issues to the jury on that theory, and would not be understood as accepting or rejecting the full extent of their position, simply holding that the law was properly declared, and that there was evidence to sustain the verdict.

The judgment should be affirmed. All concur.

ANDREWS V. BUCKBEE *et al.*, Appellants.

1. **Scire Facias**: MODE OF SERVICE. A *scire facias*, when issued to revive the lien of a judgment, should be served in the same manner as an ordinary summons.
2. ———: APPEARANCE WAIVES DEFECTS. By appearing and pleading to a writ of *scire facias*, the defendant waives defects in service.
3. ———: JEOPAILS. A *scire facias*, though informal, will be good after judgment upon it, if it contains enough to show what judgment is intended to be revived.

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Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge.

AFFIRMED.

R. F. Buller for appellants.

Reynolds & Halliburton for respondent.

HOUGH, C. J.—This is a proceeding by *scire facias* to revive the lien of a judgment. Two writs were issued. The first writ, which was issued in time, was more in the nature of a writ of summons than a *scire facias*. After the time had expired within which a writ of *scire facias* might issue, a more formal writ was issued. Both writs were served in the manner provided by law for the service of a summons. The defendants moved to quash both writs; the first, because it was defective and insufficient; and the second, because it was not issued in time. This motion was overruled, and an answer having been filed by defendants, the court, after hearing testimony, rendered judgment reviving the lien.

The questions presented for determination relate to the manner of service of a *scire facias*, and the validity of the writ first issued.

In the case of *Garner v. Hays*, 3 Mo. 436, it was held by this court that a *scire facias* served in the presence of two respectable persons of the bailiwick, was served in the mode prescribed by the statute. We have been unable to find any statute of this State prescribing the mode of service of a writ of *scire facias* to revive a judgment. The ancient writ of *scire facias* commanded the sheriff, that by honest and lawful men of his bailiwick he make known to the person named, that he be and appear, etc., etc.; and the return of the sheriff of service was, that "I have, by A and B, good and lawful men of my bailiwick, given notice to L M, tenant, etc., to be and appear," etc. Tidd's

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Forms, 479, 503; Kelly on *Sci. Fa.*, 276. But in modern practice, the writ of *scire facias* contains an ordinary clause of summons, and the writ is deemed to be sufficiently executed when served by the sheriff as a writ of summons. *Alexander v. Steel*, 13 Ark. 392. Writs of *scire facias* for revivor are by statute required to be served as writs of summons; R. S., § 3666; and summoners are no longer employed in England, either in the execution of writs for revivor, or *scire facias* on judgments. The spirit of our legislation on the subject of the execution of process is at variance with the ancient common law method of serving writs of *scire facias*, and we are of opinion that such writs, when issued to revive the lien of a judgment, should be served as similar writs are required to be served, when issued for the purpose of revivor.

In the case before us, the appellants would be bound by the proceedings had, even though the service had been insufficient, inasmuch as they appeared and pleaded to the writ.

The writ first issued was exceedingly informal, but it contained enough to notify the defendants what judgment it was, the lien of which was sought to be revived, and as the statute of amendments is made applicable to writs of *scire facias*, (R. S., § 3585,) this writ, which was issued in time, must be held to be sufficient to support the judgment.

The judgment of the circuit court will, therefore, be affirmed. The other judges concur.

LOEWER V. THE CITY OF SEDALIA, *Appellant.*

1. **Municipal Corporations: DUTY TO KEEP STREETS SAFE.** The law imposes on municipal corporations the duty of keeping their streets in a reasonably safe condition for the convenience of travel. Failing in this, they become liable for all resulting injuries.
2. **Negligence: KNOWLEDGE OF DANGER.** The mere fact that a person attempting to cross a bridge on a dark night knows that is not provided with a railing, will not prevent him from recovering damages for injuries sustained in falling from the bridge if he falls without fault or negligence on his own part.
3. ———: **DANGER SIGNALS.** Whether the want of a warning light at a bridge at night, tends to establish negligence, depends upon the character of the danger, as arising from the situation, condition and use of the bridge, and is properly a question of fact for the jury.
4. ———: **QUESTION OF FACT.** Where the question was whether plaintiff was guilty of contributory negligence in using a dangerous sidewalk when he might have walked in the roadway; *Held*, that this was for the jury, and not the court, to determine.
5. **Evidence.** Certain evidence in this case objected to as opinions of the witnesses; *Held*, to be statements of fact and not opinions, and, therefore, properly receivable.
6. **"And."** In an action for negligence defendant pleaded contributory negligence growing out of plaintiff's intoxication. At the plaintiff's instance, the court instructed that the burden of proof rested on defendant to show that plaintiff's injury resulted from his intoxication and negligence. *Held*, that this meant negligence superinduced by intoxication, and the instruction was, therefore, not misleading.

Appeal from Lafayette Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

B. G. Wilkerson and Jno. Montgomery, Jr., for appellant.

Jno. F. Philips for respondent.

MARTIN, C.—This is an action to recover damages received by plaintiff by a fall from a bridge across Fourth

street in the city of Sedalia. It was originally instituted in Pettis county on the 19th day of August, 1875, and was by change of venue removed to Lafayette county, where it was tried by a jury at the April term, 1879.

After the usual averments for negligence against a municipal corporation, the petition goes on to say, "that one of the streets in said city was, on the 28th day of April, 1875, designated and known as Fourth street; that at a point in said street known as 'Woods' Addition,' then and there was and is a large and deep ravine, over which the said city had constructed a bridge and extended partially a sidewalk on and along the northern side thereof, but unmindful of its duty in the premises, carelessly and negligently left the side of the sidewalk over said ravine wholly unprotected by railing or other guard to prevent or protect passengers from stepping or falling from said pass-way into the ravine, a depth of twelve or fifteen feet; that on the night of the 28th day of April, 1875, he was passing along said street on said night going to his home in said city in said 'Woods' Addition,' when, through the fault and negligence of said defendant, in failing to have such railing or other guard along said sidewalk over said bridge, or to have any light thereat, to enable persons to see their way thereat, although the said city had notice of the condition of said sidewalk, the plaintiff stepped and fell from said bridge into said ravine with great violence, by reason of which said fact he was greatly injured and bruised, and his life endangered; that his right leg near the hip-joint was broken, and the side of his said leg bruised and mashed from the knee to the hip, and his right arm was broken and dislocated near the wrist, his head seriously cut and bruised in divers places; and that in consequence of the injuries so received he was confined to his bed for two months, suffering great physical and mental pain, and was rendered an invalid for life, being unable to walk without crutches."

The answer consists of a special denial of the material

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allegations in the petition, with admissions in a qualified form of many of the facts therein stated. It is denied that plaintiff stepped or fell from the bridge through the fault or negligence of defendant in failing to have railings or guards on the bridge, or a light to enable persons to see their way. The answer concludes with a well defined plea of contributory negligence on the part of plaintiff, averring "that he was and for a long time previous had been entirely familiar with the exact condition and situation of said street, bridge and sidewalk, and with the situation and condition of the ground and streets adjacent to and in the vicinity thereof; that said bridge was seventy or more feet wide, and there was not the least danger of persons exercising ordinary care falling therefrom; and defendant avers that the alleged stepping off or falling off from said bridge or pass-way, and the injuries ensuing in consequence thereof, were caused by and were the direct result of the plaintiff's own negligence, intoxication and want of care at the time and immediately previous to the time he fell from said bridge, the plaintiff being then and there intoxicated to such a degree that he failed and neglected to exercise ordinary care."

The reply denied all new matter pleaded in the answer. The trial resulted in a verdict for the plaintiff on the 14th day of April, 1879, in the sum of \$3,500.

Motions for new trial and in arrest of judgment were filed and overruled, and the case comes here upon appeal by defendant. These motions are full and broad enough to cover all the points raised in the argument, and need not be introduced into this statement. The evidence in the case accorded with the pleadings. That submitted by plaintiff, was directed to establish negligence on the part of defendant in making and maintaining the bridge without railings or guards or lights to protect persons from falling off it; the defendant's evidence was directed to establish a knowledge of the condition of the bridge and a want of ordinary care in crossing it, resulting from in-

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toxication at the time. As the defendant, at the close of plaintiff's case, interposed a demurrer to the evidence, which was overruled, I will state in substance those portions of it supposed to bear on the issues of negligence by defendant, and contributory negligence by plaintiff.

The plaintiff testified that he was a tailor having a shop on Main street in Landes' jewelry store, and that he resided in Woods' Addition, which is in the western part of Sedalia; that there was a bridge over a ravine on Fourth street between the place of his residence and his shop; that in passing home in dry weather he would go through the commons north of the bridge where there was no crossing, but that in bad weather he would pass over the bridge; that after a rain there would be water enough in the ravine to sweep things away; that the ravine was made deeper by building up the street so as to make the bridge there, and that the bridge in question was the only one across it; that it was from twelve to fourteen feet wide, eight or ten feet high, and had no railing or other protection on either end of it; that there was no light or street lamp at the bridge; that there was a sidewalk on the north side of Fourth street and none on the south side; that he was familiar with the bridge and sidewalks, having been in the habit of frequently passing them by day and by night; that he only used the bridge and sidewalk when it was muddy; that on the night of the injury it was very dark; that he went upon the bridge from the sidewalk from the east side, and fell between twelve and one o'clock from the north end of it in trying to walk across it; that he thinks there were rocks where he fell; that when he came to himself he was in the ravine in the water with an arm and leg broken, and head bruised; that a heavy Scotch cap on his head was cut and probably saved him from being killed. The injuries and damages are fully detailed by the witness.

In respect to his condition on the night of the accident and how it came about, he testified: That he had spent

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the afternoon and part of the night till nine o'clock at his shop; that he then went to Beck's boarding house and saloon to see a person by the name of Slifer, with whom he was arranging for a partnership; that he was not there and plaintiff drank nothing there, that he then went to Berger's bar where he met Slifer and stayed till a little after eleven o'clock; that he possibly took a "soda" there and then left after fixing up his business with Slifer; that he then went to Landes' jewelry store to wake up the boy who slept there and get a lantern, but couldn't get in; that he then went to Herman Schmit's wine hall, where he stayed waiting for the storm to abate, till between one and two o'clock; that the storm began at eleven, and the rain began to fall about twelve o'clock; that Ivers, an express messenger, was at the hall and went part of the way home with plaintiff; that Schmit and other gentlemen were at the hall; that he did not think he drank more than two or three times with Ivers; did not think he drank the fourth time with him; that it was beer he drank; that he and Ivers started off from the hall together; that they went down Main to Kentucky street and found it flooded; then came back to Osage, went south on Osage to the market house, and then west on Second street to Kentucky street, and then south on Kentucky street by Major Beck's to Fourth street; that Ivers left him after passing up Kentucky street for his own residence, a little north of Vogler's on Moniteau avenue; that plaintiff asked Ivers for a lantern, and was told that he had none; that Ivers told him to go to Vogler's for a lantern; that he went to Vogler's and could get none; that Vogler told him that if it was not too awful stormy to take the middle of the street to the bridge, then take the sidewalk and watch the lighting; that it was very dark and began lightning and raining again; that on seeing a light at Abbott's between Vogler's and the bridge, he called, wanting a lantern; that no one came out, and he went on; that he got on the bridge from the sidewalk on the east side and waited for another

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flash of lightning; that a flash came; that he saw the sidewalk distinctly on the west side and started for it, as he supposed; that he aimed to cross the bridge; that his right foot gave away, tried to throw his weight on his left foot, but it was too late, and he went down; that the wind was blowing hard; that it was raining and he had his umbrella up; that it took all his strength to keep up his umbrella; that he fell from the north end of the bridge, and received the injuries he sues for.

Dr. Evans, who attended him, testified to the serious and permanent character of the injuries. He also testified that he reached him between two and three o'clock; that he smelt beer on his breath and thought he had been drinking, but did not regard him as drunk; that if he had been very drunk an hour before, he would not have been as sober as he was when found; that if a man was right drunk and would fall into a branch like that it might arouse him, but the shock would have a serious effect on him; that in the condition plaintiff was found by witness he could not have been very drunk an hour before.

The testimony of Hadlond, Abbott and Sloane was submitted in behalf of plaintiff corroborating him in respect to the character and condition of the ravine, bridge, sidewalk and the condition of plaintiff when found after the fall. Abbott testified that he smelt beer on plaintiff's breath; did not smell any other liquor; satisfied that it was beer. This closed plaintiff's evidence, after which the defendant demurred to the evidence, which was overruled. After stating the balance of the evidence in the case, I will recur to this action of the court in overruling the demurrer.

On the part of defendant evidence was introduced relating to the character and surroundings of the bridge, which need not be stated here. Considerable evidence was also submitted on the part of defendant tending to show that the plaintiff had been drunk the previous afternoon, and as late as seven and eleven o'clock that evening. Evi-

dence was also given tending to prove that he was drunk when taken from the ravine; that his breath smelled very strong of liquor or beer, and that when found in this ravine he spoke of having been pushed off the bridge "by bad men." The evidence tending to prove him strongly under the influence of liquor at the time of the injury, is very convincing, when considered by itself.

On the part of the plaintiff the evidence in rebuttal of this testimony relating to his condition, is equally convincing. The plaintiff introduced the testimony of Schmit and Stewart, who saw the plaintiff at the wine hall, and saw him leave sober, after having borrowed an umbrella; also the testimony of Ivers, who says that the plaintiff drank not more than two glasses of beer at the wine hall, and was sober when he left him on Kentucky street on his way home; also the testimony of Vogler, at whose house the plaintiff stopped for a lantern. This was only a few minutes before the accident. Vogler corroborated the plaintiff about the storm and the rain and the call for the lantern, which could not be furnished, and the suggestion to proceed by the uncertain electric light which was furnished by the storm. He testified that plaintiff was sober, that he saw no indication of drunkenness, and that he never saw plaintiff when he was not capable of taking care of himself.

On this evidence, however confusing or contradictory it may be, the case went to the jury, as the only tribunal provided by our laws to decide such issues.

The following instructions were given at the instance of the plaintiff.

1. It is admitted, by the pleadings, that at the time of the injury complained of, the bridge in question extended across one of defendant's streets, and that said bridge was built by defendant. It then became and was the duty of defendant to keep said bridge in a reasonably safe condition for the use and convenience of persons passing over the same, as well in the night-time as in the day-

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time; and if a part of said bridge was constructed for and used as a sidewalk for passengers, it was the duty of defendant to have erected a railing or other protection on said bridge, where the same was so used as a sidewalk, if the jury believe from the evidence that without such railing or protection the bridge was unsafe and inconvenient for persons passing over it in the night, exercising ordinary care; and in determining the question as to the safety of said bridge and sidewalk, and the necessity for a railing or other protection to said bridge, the jury will take into consideration the width and height of said bridge, and the danger incident to falling therefrom.

3. Although the plaintiff may have been familiar with the locality and condition of the bridge in question, such fact did not impose upon him the duty of exercising extraordinary care in passing over said bridge. He was only required to exercise ordinary care, and the jury will determine from the facts and circumstances in evidence, including the plaintiff's knowledge of the bridge, the facilities for reaching plaintiff's house by any other convenient route, and the darkness of the night, whether he exercised ordinary care; and, if the jury believe that a railing or other guard was necessary for safety, as instructed by the court, and that plaintiff in the exercise of such care received the injury complained of, which he would not have received had defendant placed a railing or other proper protection on said bridge, then the jury will find the issues for plaintiff.

4. Although the jury may believe from the evidence that plaintiff, on the night of and previous to the injury complained of, had been drinking intoxicating drinks, yet if they further believe from the evidence that the same had not so affected his mind and power of locomotion as to prevent him from exercising ordinary care in going to his house and passing over the bridge in question, and that he exercised such care, and would not have received the injury if defendant had placed a railing or other proper

protection on said bridge; if the jury further believe from the evidence that such railing or other protection was necessary for the reasonable safety of persons passing over the bridge, the jury will still find the issues for plaintiff.

5. The burden of proof rests upon defendant to establish the defense that plaintiff's injury resulted from his intoxication and negligence, and unless such defense is established by a preponderance of evidence, the jury will find for plaintiff as to such issue.

6. If the jury find the issues for plaintiff, in determining the measure of damages, they may take into consideration the mental and physical pain and suffering endured by plaintiff since said injury, in consequence thereof; the character and extent of said injury and its continuance, if permanent, together with his loss of time and service and his inability, if any, resulting from said injury to earn a livelihood for himself and family, and his necessary expenses for medicines and medical attention; and, may find for him such sum as in the judgment of the jury, under the evidence, will be a round compensation for the injury, not to exceed the sum of \$5,000.

8. The jury will disregard and exclude from their consideration, in making up their verdict, the expression of opinion by any witness as to the safety of the bridge in question.

The court gave the following instructions at the instance of defendant:

1. That the city of Sedalia is not an insurer against accidents upon its streets and sidewalks, nor is every defect therein, though it may cause an injury, actionable. It is sufficient if the streets, which include sidewalks and bridges thereon, are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether the bridge was reasonably safe for a foot passenger by night, is a question to be determined by this jury.

2. It devolves upon the plaintiff to prove to the satisfaction of the jury that, at the time plaintiff received his

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alleged injuries, the bridge in question was not reasonably safe for foot passengers by reason of the want of a railing or other guard to keep such foot passengers from walking off the north end of said bridge. In determining whether the want of such railing or other guard rendered said bridge unsafe as aforesaid, the rule for the government of the jury is: Was there at the time plaintiff was injured such a risk of a foot passenger, exercising ordinary care and prudence, walking off the north end of said bridge, that a railing or other guard was necessary to make said bridge safe in that respect, and, unless the jury find there was such a risk, they must find for defendant.

5. Any defect, if any, in said bridge, or in the street or sidewalks leading thereto and therefrom, except the want of a railing or other guard to keep foot passengers from stepping or walking off the north end of said bridge, must not be considered by the jury in determining whether said bridge was reasonably safe.

7. Although the jury should find that defendant was negligent in not having a railing or other guard at said bridge, and plaintiff would not have been injured but for said negligence, yet if the jury further find that plaintiff might have avoided his injuries therefrom, by using ordinary care and prudence, he cannot recover.

8. If the jury find that plaintiff was familiar with said bridge and the street and sidewalks leading thereto and therefrom, they will take this fact into consideration in determining whether plaintiff exercised ordinary care and prudence to avoid falling from said bridge.

10. Ordinary care and prudence, as used in these instructions, is such care and prudence as a sober and reasonably prudent man would have exercised under the same or similar circumstances, and the words imply the use of such watchfulness and precaution as were fairly proportioned to the danger to be avoided.

11. It was the duty of the plaintiff to use every care and precaution to avoid falling from said bridge that a

sober man of ordinary prudence would have used under the circumstances; and if he failed to use such care and precaution, and such failure contributed directly to causing his injuries, he cannot recover.

12. It is for the jury to determine, from all the facts and circumstances in evidence, whether the plaintiff was intoxicated at the time he was injured. His being intoxicated would in nowise lessen his duty to have used ordinary care and prudence to have avoided his injuries. The law requires the same care and prudence from an intoxicated man that it does from a sober man, and while the fact of intoxication alone, if proved by the evidence, will not establish want of ordinary care and prudence, yet it is a circumstance which the jury may consider in determining whether the plaintiff did exercise ordinary care and prudence.

The following instructions asked by defendant, were refused :

3. Although the jury should find that there was such a risk as that mentioned in the preceding instructions, to a person not familiar with said bridge, yet if the jury find that there was not such a risk to a person familiar with said bridge, and that plaintiff was familiar therewith, he cannot recover.

4. The want of a light at said bridge to enable foot passengers to see their way thereat, was not negligence on the part of the city.

6. If the jury believe from all the evidence in this case, that at the time plaintiff was injured, a person exercising ordinary care and prudence, and familiar with said bridge, and the streets and sidewalks leading thereto and therefrom, might have crossed said bridge in safety, and that plaintiff was familiar therewith, he cannot recover.

9. If the jury believe that plaintiff was familiar with the said bridge, and the street and the sidewalk leading thereto and therefrom, and that said bridge was reasonably safe, except in the matter of not having railing or

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other guard thereon; and that such street in front of the sidewalk was in a condition that it could have been used safely and conveniently, and was easily accessible from the sidewalk, and that plaintiff by leaving the sidewalk and taking the street might have crossed said bridge in safety by using ordinary care, he cannot recover.

13. The jury will, in considering of their verdict, exclude from their consideration that part of deposition of the witness, Gabriel Vogler, which is as follows. "Because, in the first place, there was a bridge I would have been afraid to travel over."

The court, of its own motion, gave the following instructions:

"The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in the city, to so erect and construct said bridge as to make the same reasonably safe for travel and use for all persons passing over the same on foot or otherwise, as well in the night as in the daytime; and, if the jury believe from the evidence that railing or bannistering or other guard was necessary on the sides of the bridge to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of the defendant to cause to be provided and constructed on the sides of the bridge such railing or bannistering or other sufficient guard to give protection against such danger of falls from the bridge, and the court instructs the jury, that the question whether such railing, bannistering or other guard was necessary, is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing, bannistering or guard was so necessary for the reasonable safety of persons passing over the bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing, bannistering or guard on the sides of the bridge were nec-

essary for the reasonable safety of passengers by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on the night of the 28th of April, 1875, was passing along a public street of said city, leading to and over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the sides of said bridge, he stepped or fell from said bridge into the ravine below and was thus greatly hurt and injured, in such a case the jury will find for plaintiff, and assess his damages in such sum as the jury may believe from the evidence he sustained by reason of such injury, not to exceed \$5,000."

On the evidence and instructions the case was submitted to the jury, who returned a verdict for the plaintiff in the sum of \$3,500.

To sustain the demurrer to the evidence the court would have been compelled to hold, as a matter of law, that there was no evidence contained in the plaintiff's testimony tending to show negligence on the part of defendant, in constructing and maintaining this crossing without guards or lights to prevent passengers from falling off it, or that the evidence elicited to establish the contributory negligence of the plaintiff, did not admit of any other inference than that the plaintiff was negligent, and that his negligence was the proximate cause of the injury complained of. I do not think the court would have been justified in doing this.

The law of negligence, as applied to municipal corporations, is well settled, and there seems to be no substantial difference about it between the counsel in the case. The city of Sedalia had full power over its streets and sidewalks, and the law imposed on it the duty of keeping them in a reasonably safe condition for the convenience of travel. Failing in this duty it became liable for all in-

1. MUNICIPAL CORPORATIONS: duty to keep streets safe.

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juries resulting from this negligence. *Bassett v. City of St. Joseph*, 53 Mo. 290; *Blake v. City of St. Louis*, 40 Mo. 569; *Staples v. Town of Canton*, 69 Mo. 592; *Hull v. Kansas City*, 54 Mo. 598; *Russell v. Columbia*, 74 Mo. 480. In this case the city constructed a bridge crossing a ravine from eight to fifteen feet below it, for the use of vehicles and passengers, and left it without guards or railings or warning lights of any kind to protect or help passengers in crossing it in safety either by day or night. I think negligence is the natural and necessary inference from these facts, among all men in all countries in which bridges and crossings are known and used.

In respect to the negligence and want of care in plaintiff, the simple fact that he knew there were no rail-
 2. NEGLIGENCE: ings or guards on the bridge, would not pre-
 knowledge of clude him from recovery if he fell from it,
 danger. without any fault or negligence on his part. *Buesching v. St. Louis Gas Co.*, 73 Mo. 220; *Smith v. St. Joseph*, 45 Mo. 449. The negligence imputed to him is alleged in the answer to have been the result of intoxication. To make him the proximate cause of this misfortune, we would have to hold that the imbibing of three glasses of beer and one "soda," between nine and twelve o'clock in the evening, had placed him in such a condition as to render him incapable of exercising ordinary care and prudence in getting to his home. This, we would not be justified in doing, under the evidence relating to his actual condition just before and immediately after the accident. Hence, the question of negligence as proceeding from both parties, was properly kept for disposition by the jury.

I will now briefly examine the instructions in the light of the evidence, for the purpose of determining whether the case was submitted with proper and correct declarations of law from the court. In considering these instructions it is not necessary to go beyond the objections now urged by the counsel for appellant, in their able and exhaustive brief and argument. The first two points to the

effect that the defendant's demurrer to the evidence should have been sustained, and that the finding of the jury is clearly the result of partiality or prejudice, have been practically disposed of. If these objections could not be sustained when the plaintiff closed his case, they certainly were not strengthened by the subsequent evidence *pro* and *con* upon the question of negligence and intoxication. Unless the jury was misled by instructions, their verdict will have to stand, as it is supported by too much evidence to admit of the conclusion that they were actuated by prejudice and passion, and not governed by evidence before them.

It is next urged that the fourth instruction asked by the defendant was improperly refused, and that the jury
 s. ———: danger ought to have been instructed that the absence of a light at the bridge did not constitute negligence. Whether the absence of a warning light tends to establish negligence depends upon the character of the danger, as arising from the situation, condition and use of the bridge at the time of the accident, and is properly a question of fact for the jury. *Hyatt v. Village of Rondout*, 44 Barb. 386; *Comm. v. Cent. Bridge Co.*, 12 Cush. 242. It would not have been proper for the court, in the presence of all the contradictory evidence in this case, to declare that as a matter of law there was no negligence in the absence of a warning light. It was a fact which bore upon the care and caution exercised by the plaintiff in crossing; (*Randall v. E. R. Co.*, 106 Mass. 297,) and the instruction, which entirely eliminated the fact from all surrounding facts, might have tended to mislead the jury as to its true import in the case. 8 Am. Rep. 327.

The third instruction asked by the defendant was properly refused. It in substance directed the jury to find against the plaintiff, if he was familiar with the bridge. This left out of view the question of negligence, and rendered the knowledge on the part of plaintiff of the condition of the bridge at the time, an absolute indemnity

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against all accidents, however defective and dangerous it might be.

The sixth instruction, which in substance directed a finding for the defendant if a person exercising ordinary care and prudence might have crossed the bridge in safety at the time of the injury, was properly refused. The law of this instruction is covered by the seventh, eighth, tenth and eleventh instructions given at defendant's request, where it will be found more fairly presented.

There was no error in refusing the ninth instruction asked by defendant. It in substance directed a verdict for defendant, if the plaintiff might have avoided the accident by crossing over the space commonly used by vehicles. The way in which an accident happens usually shows, after it is over, that it might have been avoided if the injured party had been possessed with the forethought to escape it by taking some other route. But ordinary prudence is not inspired with such forethought, and the law does not impute negligence for a failure to foresee and escape such dangers. It is for the jury to say whether, under all the circumstances, he was guilty of negligence in not traveling in the space commonly used by vehicles. *Barton v. Springfield*, 110 Mass. 131; *Snow v. Provincetown*, 120 Mass. 580.

There was no error in refusing the thirteenth instruction asked by defendant, to the effect that Vogler's statement as a witness should be excluded, wherein he says that he was afraid to travel over the bridge. This was not an opinion, but a reason assigned by him on cross-examination for advising the plaintiff to take the middle of the street. He was asked for his reason and he gave this in answer to the inquiry. The statements of Hadlond that he usually carried a lantern when crossing the bridge, and that the wind blew strong up the ravine, are not opinions, and are properly admitted.

The fifth instruction, at the instance of plaintiff, has been criticised as imposing on defendant the burden of

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establishing the defense of contributory negligence, by requiring proof of both intoxication and negligence to make it out. It may be remarked that the only negligence complained of in the answer is alleged to proceed from intoxication, "the p'aintiff being then and there intoxicated to such a degree that he failed and neglected to exercise ordinary care." The evidence submitted by defendant bearing on the negligence of plaintiff related to intoxication as the immediate cause. The instruction obviously was intended to require proof of such intoxication as culminated in negligence. Under the pleadings and the evidence, which related only to the negligence superinduced by intoxication, I think this instruction could not have been misleading.

The instruction given by the court of its own motion, was eminently fair and comprehensive. No point is made against it by the counsel for appellant in their brief. The case, upon the whole, seems to have been placed fairly before the jury. The result cannot be disturbed by the appellate court, without taking upon itself the functions of a jury. It is more than probable that another trial would terminate in the same result. Accordingly, the judgment is affirmed. WINSLOW, C., concurs; PHILIPS, C., not sitting, having been of counsel when the case was submitted to the court.

PRICE V. THE INHABITANTS OF THE TOWN OF BRECKENRIDGE,
Appellant.

1. **Dedication to Public Use.** Land marked "Public Square" on a plat duly executed and acknowledged by the proprietor, is thereby dedicated to public use.
2. ———. The facts in this case, *Held*, sufficient to justify a finding that a dedication had been made to public use.

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3. ———: ADVERSE POSSESSION. In the absence of a dedication, possession and user of land by the public under claim of right for a period short of the statutory period of limitation, will not vest title in the public.
4. **Ejectment.** It is manifest error to give judgment for the plaintiff for the whole of the premises in controversy, when his own evidence shows that a part of the title is vested in others.

Appeal from Caldwell Circuit Court.—HON. E. J. BROADDUS,
Judge.

REVERSED.

Crosby Johnson for appellant.

O. J. Chapman for respondents.

HENRY, J.—This is an action of ejectment to recover possession of block No. 15 in the town of Breckenridge. The answer is a general denial, and a special plea of the statute of limitation, and also that the former owners of the town site dedicated the block in question as a public square, by so marking it on the plat filed, and further, that said original proprietors, while yet owners, represented that they had dedicated it for that purpose, and thereby induced others to purchase lots fronting thereon at higher prices than would otherwise have been paid for them. The reply was a general denial, and on a trial of the cause plaintiffs had judgment, from which this appeal is prosecuted.

Plaintiffs' evidence tended to prove that the land embraced in the town site was patented to Henry Gist, who conveyed it to plaintiff Price, as trustee and manager of the town company, consisting of Gist, Wadlow, Terrill and Price; that by conveyances from Wadlow and the heirs of Gist and Terrill, except two minors, plaintiff acquired the title to all of the land, except the interests of said minor heirs of Terrill.

It was admitted that the original plat of said town

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was burned with the court-house in 1860, and that there was no certified copy in existence.

Price testified that he never dedicated his interest in the block; that in posters advertising public sale of lots in October, 1856, and July, 1857, it was stated that ground had been reserved for public use in case a new county should be formed with Breckenridge as a county seat, and, except in that manner, no dedication was ever made; that on the plat it was simply marked 15, but the people were in the habit of calling it "the public square." One of the posters accompanying his deposition contained clauses to the following effect: "Ample grounds have been reserved for public purposes," and in one, "Ample grounds have been reserved for county buildings, in case Breckenridge becomes a county seat."

Dr. Bottom testified that his father bought a large number of lots at one of the public sales made by the town company, and that witness moved to Breckenridge soon after as agent of the property, and in 1862 asked Price for a plat of the town, and that he handed him a plat which had the words "public square" written across block 15; that this was in Price's handwriting. He also introduced another plat on brown paper sent to him by Price in 1867, with "public square" written in Price's handwriting across block 15. That when he went to Breckenridge this block was lying out to commons, and so continued until 1867, when it was fenced and planted in trees by public subscription, and has ever since remained under the control of the town, and that he never heard of any attempt by the original owners or their grantees to exercise any ownership over the block. The town company never included this block in their list of property for assessment for taxes.

Hatfield testified that he was present in 1856 at a public sale of lots by said company, and that the auctioneer publicly announced that block 15 would not be sold, as it was reserved for a public square, and that he bought a lot

fronting on said block, supposing it would be a public square. Rob't Trosper testified that he was present at the sale, and heard the auctioneer announce that block 15 was for a public square.

A witness for plaintiff, Riol, testified that he was present at said sale, and that the auctioneer did not announce that block 15 was reserved for a public square, but that it would be reserved for public buildings in case the town became a county seat.

The first and second instructions asked by defendant properly declared the law on the facts testified to by Bottom, Hatfield and Trosper, but the court refused one asked to the effect, that if block 15 was marked in the original plats of said town as a public square by the proprietors of said town, or James A. Price, their trustee, then plaintiffs cannot recover. If the plat was acknowledged by Price, as trustee, in pursuance of the conveyance to him by Gist, this instruction should have been given. We infer from the evidence that the tract was conveyed to him before the plat was made, and that he, as vested with the legal title, executed and acknowledged the plat. So far as we can gather the facts from this record, that instruction should have been given.

The court also refused the following asked by defendant:

4. If the court finds from the evidence that James A. Price was trustee and manager of the Breckenridge Town Company, and that a plat of said town was filed in the recorder's office of Caldwell county, which was afterward burned and destroyed at the burning of the courthouse in 1860; and if the court further finds that the proprietors of said town in 1856 made a public sale of town lots, and that it was announced by the auctioneer, publicly, that block 15 was reserved for a public square; that Wm. R. Hatfield heard said announcement of said auctioneer, and thereafter, at said sale, purchased property fronting on said block; and if the court further finds from the evi-

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dence that afterward, in the year 1862, said James A. Price delivered to Mr. Bottom a plat of said town purporting to be a true plat thereof, on which said block 15 was marked as a public square; that afterward, in 1867, when requested to furnish a plat of said town, he furnished one on which said block was marked as a public square; and if the court further finds from the evidence that from and after the time of said public sale in 1856, up to the time the same was fenced by a public subscription of said town, said block was permitted to be out as public commons and that during said time neither the said James A. Price, nor the other proprietors of the town, exercised any acts of ownership over the property, and at the time the same was fenced no objection was made by said parties; then the court may infer from said facts and circumstances that said block had been dedicated to the public use, and the court should find from said conduct and acts of said James A. Price that he is now estopped and debarred from asserting or claiming any title or interest that he may have had therein at said time.

This instruction should also have been given. If the facts stated therein would not authorize a court, or a jury, to find a dedication, both as against the town company and Price, it would be difficult to conceive of a state of facts that would.

Other instructions asked by defendant predicating a right upon the inclosure of the block by a public subscription in 1868 or 1869, and the use of the same as a public square, claiming it as such, by the inhabitants from either of those dates to the institution of the suit, were properly refused. This suit was commenced in October, 1877, and possession from 1868 to October, 1877, was short of the time which by the statute barred plaintiffs' claim. Nor were those facts alone sufficient to authorize a jury to find that the block had been dedicated to public use.

There was manifest error in the judgment, by which

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plaintiffs recovered the entire block, while their own evidence showed that two of Terrill's heirs had an undivided interest in the property, if there had been no dedication.

There is nothing in the point that the court's attention was not called to this error. One of the grounds for a new trial set out in the motion is, that the "judgment is against the law and the evidence." This was sufficient.

The judgment is reversed and the cause remanded. All concur.

.

WHITE, *Plaintiff in Error*, v. STEPHENS.

Deed of Trust: POWER OF SALE: SHERIFF ACTING AS TRUSTEE: DEATH OF GRANTOR: RECITAL. A deed of trust given to secure a note provided, among other things, (1) That in case of the absence, death, etc., of the trustee, the sheriff of the county should execute the power of sale conferred upon the trustee; (2) That any statement by "the said trustee" in the deed to be executed by him in pursuance of a sale, as to the non-payment of the note, the advertisement, sale, etc., should be *prima facie* evidence of the fact. *Held*, (1) That the death of the grantor did not revoke the power of the sheriff to sell; (2) That when the contingency arose in which the sheriff was authorized to act, he became *pro hac vice* the trustee, and proper recitals in a deed executed by him were to be received as *prima facie* evidence.

Error to Marion Circuit Court.—HON. JOHN T. REDD, Judge.

REVERSED.

Edward McCabe and Thos. L. Anderson for plaintiff in error.

W. M. Boulware for defendant in error.

HOUGH, C. J.—This is an action of ejectment. The plaintiff claims title as purchaser at a sale under two trust

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deeds, executed by one John Stephens and the defendant Mary A. Stephens, his wife, each of which deeds covered the premises in controversy, and provided that in case of the absence, death, refusal to act, or disability in anywise of the trustee named therein, the then acting sheriff of Marion county should, at the request of the legal holder of the note secured by said deed, proceed to sell the property at public vendue, to the highest bidder, and upon such sale should execute and deliver a deed in fee simple of the property sold to the purchaser. Each of said deeds also contained the provision that "any statement of facts or recital by the said trustee in relation to the non-payment of the money secured to be paid, the advertisement, sale, receipt of the money and the execution of the deed to the purchaser, shall be received as *prima facie* evidence of such fact." John Stephens died in possession of the premises sued for. More than nine months after his death, the contingency provided for in each of said deeds, upon which the sheriff was to act, having arisen, the sheriff made sale of the property and conveyed the same to the plaintiff, who was the purchaser at said sale. The recitals in the sheriff's deed show conformity to the requirements of the trust deed as to notice, time, place and manner of sale.

The circuit court held that the death of Stephens revoked the power of the sheriff to sell, and also ruled that the recital by the sheriff in his deed of the notice of sale and the publication thereof was not *prima facie* evidence of such facts, and thereupon rendered judgment for the defendant.

It is conceded by the defendant's counsel that when a power is coupled with an interest and united in the same person, as in the case of a mortgage with power of sale, the death of the grantor will not work a revocation of the power. *Beatie v. Butler*, 21 Mo. 313. It is also conceded that in the case of trust deeds like those before us, the sheriff may sell, and his conveyance will pass the title, although the legal title was vested in the trustee, and that

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the power conferred upon the sheriff by the deed is irrevocable by the grantor, during his life. *McKnight v. Wimer*, 38 Mo. 132. But it is contended on the authority of *Hunt v. Rousmanier*, 8 Wheat. 174, that in such case, the death of the grantor works a revocation of the power of the sheriff. In the case cited, an attorney in fact was invested with authority, as collateral security for the payment of a debt, to sell a brig at sea and pay the proceeds to the creditor, and it was held, Chief Justice Marshall delivering the opinion of the court, that the death of the principal revoked the power of the attorney, although such power could not have been revoked by the principal during his life, by reason of the interest of the creditor in its execution, arising from the contract of the parties. In that case no right or interest in the thing to be sold, was transferred or conveyed to any one, to secure the creditor. In the case at bar, the title passed from the grantor to the trustee named in the deeds of trust, as a security for the debt, and was subject to be divested upon the execution of the power by the sheriff, and the conveyance of the sheriff was not required to be made in the name of the grantor in the trust deed, and the well known rule announced in *Hunt v. Rousmanier*, that an attorney in fact cannot execute a conveyance in the name of his principal after the death of the principal, is, therefore, inapplicable here. It is, doubtless, true that when a naked power is conferred by the owner of land upon another to sell the same to pay the debt of a third party, for whose security such power has been conferred under a contract therefor, the death of the principal would revoke the power, (although the principal could not revoke the power during his life,) and that for the reason that the power could not be executed by the principal after his death. Here, however, the sheriff has a power coupled with an interest *sub modo*. The trustees are, by the terms of the deed invested with the legal title, and contingently seized to the use of the sheriff, for the purpose of making his sale and conveyance effectual, and we are of opinion

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that such a power is not revoked by the death of the grantor.

We are further of opinion that the recitals in the sheriff's deed are *prima facie* evidence of the facts recited. Having to make the conveyance provided for, as to such recitals, he is *pro hac vice* the trustee within the meaning of the deed of trust. *Gaines v. Allen*, 58 Mo. 537.

The judgment will be reversed and the cause remanded. All concur.

BRAXTON V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

1. **Railroads: FAILURE TO RING AND WHISTLE: ACTION UPON THE STATUTE FOR DAMAGE TO CATTLE.** To fix upon a railroad company liability under section 38, page 310, Wagner's Statutes, (R. S. 1879, § 806,) for killing cattle, it is not sufficient to show that the cattle were killed by the train at a public crossing, and that the company's servants failed to ring the bell or sound the whistle in approaching the crossing, as required by that section. Evidence must also be given to show that the killing resulted from the failure to ring or whistle. Compare *Alexander v. Hann. & St. Jo. R. R. Co.*, 76 Mo. 494. NORTON, J., dissented.
2. ———: ———. If the evidence fails to show this, the plaintiff cannot recover by proving other negligence of the company, which, concurring with that omission of duty, occasioned the injury.
3. ———: ———: **ACTION AT COMMON LAW FOR DAMAGE TO CATTLE.** In a common law action against a railroad company for negligently killing cattle, the plaintiff may prove any negligence of the company tending to produce the injury, including in a case where the killing occurred at a public crossing, failure of the company to ring the bell or sound the whistle.

Appeal from Hannibal Court of Common Pleas.—HON. JOHN T. REDD, Judge.

REVERSED.

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Geo. W. Easley for appellant.

Homer B. Leach for respondent.

HENRY, J.—This action was commenced before a justice of the peace by plaintiff to recover damages for the killing of his cow by a train of defendant's cars. The statement filed contained two counts, one based upon the 38th section of article 2, chapter 37, Wagner's Statutes, and the other a common law count for negligence. Plaintiff had judgment successively in the justice's court and in the circuit court, and from the latter this appeal is prosecuted.

The animal in question was killed just before daylight on a public crossing. No one witnessed it, except the train men, none of whom were called to testify. The fact of the failure to sound the whistle or ring the bell, as required by statute, was proved, and that the cow was killed on the railroad where it crossed a public road, was admitted. There was also evidence to show that for two or three days prior to the killing of this cow some hay left on the track and on the side of the track at that point by parties who shipped fruit trees over the road, was permitted to remain and was still there when the cow was killed, and that when found she had hay in her mouth.

This was all the evidence in the case, and the court instructed the jury properly as to defendant's duty under section 38. It also declared to the jury that no negligence on the part of defendant was shown in leaving the hay on the crossing, and that plaintiff was not entitled to recover on the second count of his statement. It also properly refused one asked by defendant, that admitting all the evidence offered by plaintiff to be true, the jury should find for defendant. This applied to both causes of action in the statement, and, as we shall hereafter show, should not have been given as to the second count. And for the same reason, the instruction given by the court, with respect to

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the hay left on the track, was erroneous. The court refused an instruction asked by defendant, declaring that although there was a failure to ring the bell or blow the whistle, as required by the statute, and the cow was killed on the crossing, yet this was not sufficient evidence to entitle the plaintiff to recover. This was probably refused because it had already been declared in the instruction for plaintiff, in which the jury were told, that although they might find that the servants on the train neglected to blow the whistle or ring the bell, yet unless they should find that the striking and killing of the cow resulted from such negligence, they should find for defendant.

The court also refused the following asked by defendant: "There being no evidence to show that the failure to ring the bell or sound the whistle caused the injury, the verdict must be for defendant on the first count."

1. RAILROADS: failure to ring and whistle: action upon the statute for damage to cattle.

This declared the law as held by this court in *Holman v. R. R. Co.*, 62 Mo. 563, and *Stoneman v. R. R. Co.*, 58 Mo. 503, in which the court said: "There may have been no connection whatever between the negligent omission and the damage; and the very terms of the statute, under which the suit is brought, clearly indicate that the damage must be the result of the negligence." That section requires the bell to be rung or the whistle sounded, at least eighty rods from the place where the railroad crosses any traveled public road or street, the bell to be rung continuously, or the whistle to be sounded at intervals until the locomotive shall have crossed such road or street—and also provides, in addition to a penalty to be recovered by an informer, that the company "shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

In a suit under this section by one injured in person or property, if the evidence fails to show that the injury
2 —: —. resulted from the neglect of the statutory duty, the plaintiff cannot recover by proving other negli-

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gence of the company, which, concurring with that omission of duty, occasioned the injury. Evidence of other negligence or carelessness is irrelevant and inadmissible. In *Cary v. R. R. Co.*, 60 Mo. 209, and *Crutchfield v. R. R. Co.*, 64 Mo. 256, it was decided that in an action under the 43rd section of the Corporation Act, there could be no recovery for an injury resulting from negligence in the management of the train. The reason for that decision is equally applicable to an action based upon the section under consideration. One cannot base an action upon the statute and recover on a cause of action not alleged. If he cannot prove the connection between the omission of the statutory duty and the injury complained of, and can only establish a right of action by evidence of other negligence, he must resort to his common law action. The evidence with respect to the hay proved only what was admitted, that the cow was killed at the crossing, and under the decisions above cited, this was not sufficient to warrant a verdict for plaintiff.

The court erred in declaring that plaintiff was not entitled to recover on the second count. Under that count
 s. ———: ———: he had the right to prove any negligence of
 action at common the company that contributed to produce the
 law for damage injury complained of, including that of a
 to cattle. failure to ring the bell or sound the whistle, as required
 by the section under which this suit is brought. *Goodwin v. R. R. Co.*, 75 Mo. 75.

The judgment is reversed on account of the refusal of defendant's instruction last noticed. All concur, except NORTON, J., who dissents.

NORTON, J., DISSENTING.—I understand the judgment is reversed in this case upon the ground that the court refused to give on defendant's motion the following instruction, viz: "There being no evidence to show that the failure to ring the bell or sound the whistle caused the injury, the verdict must be for defendant on the first

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count." The first count of plaintiff's petition sought a recovery for the killing of plaintiff's cow at a public road crossing because of the failure of defendant to ring the bell or sound the whistle, as required by law. In the opinion of the court it is stated, and the statement is borne out by the record, that "the fact of the failure to sound the whistle or ring the bell, as required by statute, was proved, and that the cow was killed on the railroad where it crossed a public road, was admitted."

With the admitted fact that the cow was killed on a public crossing, and the proved fact that defendant neither sounded its whistle nor rung its bell, I am unwilling to say that the trial court erred in refusing to give the above instruction, telling the jury that there was no evidence that the failure to ring the bell or sound the whistle caused the injury, and that they should find a verdict for defendant. On the contrary, my opinion is that in such cases, where a plaintiff shows that the stock was killed on a public crossing by a railroad, and that the railroad company failed to ring its bell or sound its whistle, as required by statute, that he makes out a *prima facie* case, entitling him to a recovery, unless such *prima facie* case is rebutted by other evidence, or at the very least it is sufficient evidence to allow the jury to pass upon the question whether such neglect and omission of duty on the part of the company caused the accident.

It is laid down in 1 Greenleaf Ev., 17, that one of the chief grounds of evidence "is the known and experienced connection between collateral facts and circumstances, satisfactorily proved, and the fact in controversy." In the present case the fact in controversy is not that the animal of plaintiff was killed on a public crossing, for that is admitted, nor that defendant failed to ring the bell or sound the whistle, for that is proved by uncontradicted evidence, but it is whether the injury to plaintiff's cow was caused by the failure of defendant to do either one or the other of these things. The fact as to whether or not the injury

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of the animal was the result of defendant's failure to give the statutory signals is to be deduced from the fact that common experience and observation teaches that giving such signals would have the effect of not only attracting the attention of animals to the approaching train giving them out, but to frighten them away from the approaching danger. That such effects would follow is a matter of common experience, observation and knowledge. And it was doubtless this known connection between the giving of such signals and their effects upon animals which induced the general assembly to impose it as a duty upon railroad companies to give the signals a sufficient distance from their crossings to enable both man and beast to get out of the way of the danger.

The question presented is not one of first impression, and is of sufficient importance to justify me in adverting to our own decisions concerning it, believing as I do that taken as a whole they sustain the views above expressed.

The question was first considered in the case of *Howenstein v. Pacific R. R. Co.*, 55 Mo. 33, where it was expressly held that proof that stock were killed at a road crossing by a railroad train, and that the bell was not rung nor whistle sounded, as required by statute, is sufficient to make out a *prima facie* case against the company, without further evidence that its employees were guilty of negligence which caused the damage. The next case was that of *Owens v. Hann. & St. Jo. R. R. Co.*, 58 Mo. 392, where the doctrine of the *Howenstein* case was re-affirmed in the most emphatic manner, all the judges concurring. The next case is that of *Stoneman v. Atlantic & Pacific R. R. Co.*, 58 Mo. 503, where it was held that whether the killing of stock on a road crossing was caused by the failure of the company to ring its bell or sound its whistle was a question of fact to be determined by the jury, and for the reason that the court in that case did not in an instruction submit that fact to the jury, and refused one that did sub-

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mit it to them, the judgment was reversed and cause remanded. The doctrine of the case of *Howenstein v. Pacific R. R. Co.*, *supra*, was not assailed in the above case, but on the contrary, Judge Napton, who delivered the opinion, expressly indorsed it, in the following language: "The question as to the proof necessary to show the connection between the negligence of failing to ring the bell and sound the whistle and the loss sustained is another matter, upon which the opinion of the court in *Howenstein v. Pacific R. R. Co.*, 55 Mo. 33, is in point."

The next case is that of *Holman v. Chicago, R. I. & P. R. R. Co.*, 62 Mo. 562, where the doctrine is for the first time announced that where the only proof in a suit against a railroad company, for killing stock at a public crossing is the death of the animal, and the failure of the company to ring the bell or sound the whistle, it is the duty of the court to declare as a matter of law that the plaintiff cannot recover. No authority is cited upon which the conclusion reached was based except the case of *Stoneman v. Atlantic & Pacific R. R. Co.*, 58 Mo. 503, which, as I have endeavored to show, contained an express approval of the opinion in the case of *Howenstein v. Pacific R. R. Co.*, *supra*.

The latest utterance of this court upon the subject is to be found in the case of *Edwards v. Chicago, R. I. & P. R. R. Co.*, 76 Mo. 399, which was an action to recover damages for the killing of plaintiff's cow on a public crossing, alleged to have been occasioned by the failure of defendant to ring its bell or sound its whistle. The evidence showed (as in the case I am considering) that the cow was killed on the crossing, and that defendant neither rung the bell nor sounded the whistle, as required by law. The court refused an instruction that on the evidence plaintiff could not recover, and also the following instruction: "Evidence that the defendant's employes in charge of the locomotive and train failed to ring the bell or sound the whistle on the train in proof is not sufficient to authorize

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a recovery. Such evidence must be supplemented by other proof showing that if such signals had been given the animal in question would not have been injured."

Notwithstanding the refusal of the court to give the above instructions, which action was excepted to at the time and relied upon by defendant to reverse the judgment, this court affirmed the judgment, thereby sustaining the action of the trial court in refusing said instructions. If the plaintiff was entitled to a recovery on the evidence in that case, I am unable to perceive why the plaintiff in the case in hand should not likewise be permitted to recover on proof of same facts. If it was right for the court in that case to refuse to tell the jury that on the evidence the defendant was entitled to a verdict, it was also right for the court to refuse in the case under consideration to tell the jury that plaintiff could not recover.

The action of the circuit court in refusing to give the instruction asked, is in my judgment not only sustained by four out of the five cases above referred to, but also by reason. If from the admitted fact that the animal was killed on the crossing, and the proved fact that the defendant did not give the statutory signals in approaching the crossing with its train, and from the known fact taught by common experience, observation and knowledge, that the effect of those signals when given is to frighten and drive animals away from such crossing, the jury may not infer the further fact that the killing of the animal on such crossing was the result of such omission to ring the bell or sound the whistle, I can see no force in the rule of evidence above quoted from Mr. Greenleaf, and am at a loss to perceive what other evidence would be required to be introduced by a person suing for stock killed under such circumstances, unless it be to show that the animal had ears and could hear, eyes and could see, or that such noise as ringing of a bell or the sounding of a steam whistle on an approaching train would attract the animal's attention to

the train, and tend to frighten it away from its approach, all of which things are matters of common knowledge requiring no proof.

THE STATE *ex rel.* MCKOWN v. WILLIAMS *et al.*, Appellants.

1. **Pleading :** PETITION, SUFFICIENCY AFTER VERDICT. If the facts requisite to constitute a cause of action are necessarily inferable from the petition taken in its entirety, though informal in its parts, it is good after verdict.
2. — : ESTOPPEL : RECITAL IN BOND. A recital in a bond is a solemn admission by the obligor of the truth of the fact recited, and when, in an action against him, the bond is pleaded *in hæc verba*, the effect is the same as if there was a formal plea of estoppel.
3. — : ANSWER, NEW MATTER. An answer averring conclusions of law from facts already stated in the petition, does not set up new matter, and does not require a reply.
4. — : — : WAIVER. Although the answer sets up new matter and the plaintiff fails to reply, yet if the case is tried as if the new matter was in issue, this court will treat it as if a reply had been filed.
5. **Guardian's Bond :** LAW OF SISTER STATE. A bond given in a probate court of this State, in conformity with a law of another state, by a guardian in this State of a ward resident here, in order to obtain possession of property of his ward located in the other state, is a valid bond, and an action may be maintained on it for property received in virtue of it.
6. — : —. The validity of such a bond is not affected by the fact that it contains a condition not required by the law of this State.
7. — : —. Such a bond is not essentially collateral or auxiliary to the ordinary guardian's bond ; the ward may resort to either, certainly to the former when the makers of the latter are insolvent so that resort thereto would be unavailing.
8. — : MEANING OF "ACCOUNT FOR." A condition in such a bond to "account for" the money received in the other state is not satisfied by the guardian charging himself therewith in his settlements, nor by anything short of payment.

The State ex rel. McKown v. Williams.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.

AFFIRMED.

F. P. Wright and Wm. C. Price for appellants.

Boyd & Vaughan and Chas. A. Winslow for respondents.

PHILIPS, C.—One S. H. Hall died, leaving an estate in money in the hands of the clerk and master of the chancery court of Giles county, state of Tennessee. His children and heirs lived in Christian county, Missouri. L. C. Hall is one of the heirs, now intermarried with A. H. McKown. This suit is brought to her use. R. H. Williams, appellant, was appointed guardian of these children by the proper court of Christian county, and gave the requisite bond. This guardian desiring to obtain possession of said money in Tennessee, it was necessary for him, to accomplish the transfer of the funds, to comply with the requirements of the statute of Tennessee in such case provided. The laws of Tennessee provide that when a minor and his guardian reside in another state, his property may be removed to the state of his residence, and, if it is in the custody of the court, or its officer, the application for its removal shall be made to the court. In doing so, the guardian must exhibit to the court a transcript of the record of his appointment, embracing his bond, conditioned as by the laws of the state is prescribed in regard to the duties of the guardian there, and also conditioned to account for and pay over to the minor, according to the law of his domicile, the money received in Tennessee, * * and if the court approves the record and certificates, and is satisfied, from proof, that it is the interest of the minor that the money should be removed to the place of his residence, the court * * shall direct the money to

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be paid to said guardian. Stat. Tenn., vol. 2, § 2539 to 2543.

Accordingly on the 1st day of March, 1869, he, as principal, and the other appellants as sureties, executed to the State of Missouri their bond in the penal sum of \$8,000 to meet the requirements of this Tennessee statute. This bond recited the facts of this money being in said clerk's hands, and that said guardian was about to make application therefor, and contained the following condition:

"The condition of the above obligation is, that whereas the above Robt. H. Williams is the lawful guardian of M. Catharine Hall, Louisa C. Hall and Samuel H. Hall, who are minors under the age of twenty-one years, and whereas the said minors reside in the said county of Christian, State of Missouri, and have coming to them as heirs at law and distributees of Samuel H. Hall, Sr., deceased, late of the county of Giles, and state of Tennessee, an interest in his estate consisting of about \$4,000, which is in the hands of the clerk and master of the chancery court of the said county of Giles; and whereas the said Robert H. Williams, as guardian aforesaid, is about to make application to the proper authorities in the state of Tennessee for said ward's interest in said estate, or such sums of money as may be due, to be paid over to him as guardian as aforesaid, in this state; Now, therefore, if the said Robt. H. Williams, as such guardian of M. Catharine Hall, Samuel H. Hall and Louisa C. Hall, shall well and truly account for and pay over such estate or sums of money as shall be received by him in the state of Tennessee to said M. Catharine Hall, Louisa C. Hall and Samuel H. Hall, their heirs or legal representatives, or such other person as may be authorized and entitled to receive the same in the State of Missouri, or by the laws of the State of Missouri have been or shall be prescribed in relation to the duties of guardian therein, then this obligation to be void, but otherwise to remain in full force and effect."

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This bond was approved by the Christian county court having jurisdiction of the guardianship.

On the presentation of this bond and his application to the Tennessee court, Williams received \$900 of said money, one-third of which belonged to his ward, the respondent. The guardian charged himself with said money, and showed the same to be on hand in his annual settlements up to 1877. Failing to pay over this money to his ward on the attainment of her majority, this suit is instituted on said bond to recover the same.

The petition alleged the making of this bond, and filed a copy therewith. It then set out *in haec verba* the conditions of the bond. It averred that said bond was given in conformity to the provisions of said Tennessee statute, and in order to have said money transferred to this State. It averred the marriage of said ward to McKown in 1878, and her majority. It averred as breach of said bond the fact of the receipt of said money by Williams and his failure, neglect and refusal to account for said money to the said relators, or either of them, or to any one authorized to receive it for them.

The two sureties answered, tendering the general issue. They further alleged that the bond was not a guardian or other official bond; that it was without consideration or inducement, and that it was merely a collateral bond, etc.; that no money was received by their principal properly chargeable on said bond, but was chargeable on his guardian's bond. Williams answered separately, simply alleging that all the money he received, he accounted for in his settlements as said guardian.

The trial was had before the court without a jury. Plaintiff read in evidence said bond, the records of the Christian county court, the proceedings in the Tennessee court, showing the presentation of said bond to that court and the order thereupon turning over the money to Williams, and made proof of his failure to pay over the money, and the insolvency of Williams and the sureties on his

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first bond as guardian. On this state of facts, if found, the court declared in substance the law to be that plaintiff could recover, and refused the converse of the proposition asked by defendants. It found the issues for plaintiff and rendered judgment accordingly. Defendants bring the case here on appeal, after an ineffectual effort for a new trial and motion in arrest.

The claim that the petition does not state a cause of action, is not tenable. It is unlike the declaration in *Moore v. Platte Co.*, 8 Mo. 467, which did not aver that the defendant executed the bond to anybody. Here the petition distinctly avers that defendants "made and entered into a bond payable to the State of Missouri in the penal sum of \$8,000." The "legal effect" of this bond is fully set forth in its conditions, which are set out *in haec verba* in the petition, and this, we think, rendered unnecessary any matter of inducement in the preceding part of the declaration. The very objection lodged against the count in *Woods v. Ramey*, 15 Mo. 484, cited by appellant, was that "the conditions were not stated in the petition." So in *Langford v. Sanger*, 40 Mo. 160, the petition did not sufficiently aver "performance by the plaintiffs, and there was no allegation whatever of a breach by defendants." Here it is distinctly averred that defendant Williams, under said bond, obtained possession of the money, and the breaches are well assigned. The petition might have been more specific. But under the code there is an important distinction between the failure to state any cause of action at all, and defectively stating one. The former is bad even after verdict, but in the latter case if the defendant goes to trial on the petition, it is good after verdict. And if the facts requisite to constitute a cause of action are necessarily inferable from the pleading taken in its entirety, though informal in its parts, it is good after verdict. *Edmonson v. Phillips*, 73 Mo. 57; *Hirt v. Hahn*, 61 Mo. 496; *State to use of Ladd v. Clark*, 42 Mo. 519; *Corpenney v. City of Sedalia*, 57 Mo. 88; *Schultz v. Merc. Ins.*

1. PLEADING: petition, sufficiency after verdict.

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Co., 57 Mo. 331; 2 Wag. Stat., p. 1036, § 19, clauses 8 and 9.

Nor is the objection well taken, that it does not appear that Williams was ever appointed guardian, etc., or that
 2. ———: estoppel, any money, etc., ever came into his hands by
 recital in bond. virtue or in consequence of said bond. The consideration of the bond, which is set out in the petition, recites "that whereas the above Robt. H. Williams is the lawful guardian," etc. This recital is a solemn admission by the defendants of Williams' guardianship, and its incorporation into the petition is the same as if it had been pleaded as an estoppel. The petition in assigning the breach of this bond avers "that said Williams, as such guardian, about the year 1870, received of said estate, in sums of money due the said Louisa McKown, in the state of Tennessee, by virtue of said bond, the sum of \$600;" and then in express terms, avers his failure, neglect and refusal to account for the same.

It is also insisted by counsel for the appellants, that there was no reply to the new matter set up in the joint
 2. ———. answer, answer of the defendants, Collins and Chap-
 new matter. man, and the same stands as admitted. There is nothing pleaded in what is claimed as new matter, which could not have been shown under the general denial in the preceding part of the answer. *Wheeler v. Billings*, 38 N. Y. 263; *Greenfield v. Mass. M. L. Ins. Co.*, 47 N. Y. 430; Bliss Code Plead., §§ 328, 333. There is no inconsistency between a right of recovery on the facts alleged in the petition and those specially pleaded in the answer. "A statement of facts, by way of defense, which are merely inconsistent with those stated by the plaintiff, is in effect a denial. It is not new matter; it admits nothing; it simply contradicts." This is obnoxious as argumentative pleading. Bliss Code Plead., § 333. In short, this so-called new matter sets up mere conclusions of law, deduced from facts already included in the petition; and when the new facts are admitted, the question recurs, do they disprove

the plaintiff's claim or subvert his right? If they do not, the new facts thus admitted by a failure to deny are nothing.

Even had they possessed any merit, the parties having gone to trial and tried the whole case through, as if all the
 4. ———; ———: matters mutually averred were at issue, and
 waiver. no questions as to admissions of pleadings
 having been raised below, the case will be treated here as if the new matter had been timely and properly denied. *Howell v. Reynolds Co.*, 51 Mo. 154; *Simmons v. Carrier*, 63 Mo. 421.

This brings us to the consideration of the only remaining question of importance raised by this record: Can the
 5. GUARDIAN'S BOND: law of sister state. plaintiffs maintain the action on the bond? It was certainly founded on a good and meritorious consideration. The principal in the bond, as guardian of the ward, was entitled under certain considerations to concentrate the ward's estate in the jurisdiction of her domicile. The estate being, however, rightfully in the state of Tennessee, was subject to its chancery jurisdiction and statutory regulation, with the power and even the duty to impose terms and conditions upon its removal to a foreign jurisdiction. The law and the courts, its minister, stand *in loco parentis* in respect of the care and protection of orphans' estates. So the legislature of Tennessee had, rightfully and wisely, as a measure of protection and an additional safeguard to such funds, provided, in the statute referred to, that before any non-resident guardian could remove the estate into another jurisdiction, he should present to the court his bond, conditioned not only as required by the laws of the guardian's domicile, but containing also the additional condition "to account for and pay over to the minor according to the law of his domicile, the money received in Tennessee." The requirement by the Tennessee law of such a bond, and obtaining the money under it, constituted a good and valuable consideration to support the undertaking, and an action for its breach. Even a volun-

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tary bond, if it does not contravene any public policy or violate any statute, is binding on the makers. And a bond given for the performance of a trust reposed, private or public, is valid. *Merrick v. Trustees of Bank, etc.*, 8 Gill (Md.) 61; *Hammond v. Henssey*, 51 N. H. 40; *Cook v. Bradley*, 7 Conn. 57; *Gathwright v. Callaway Co.*, 10 Mo. 663; *Barnes v. Webster*, 16 Mo. 258; *Henoch v. Chaney*, 61 Mo. 129, 132. Such a bond as this, given for a lawful purpose, even though not in form, is obligatory. *U. S. v. Bradley*, 10 Pet. 343.

The Tennessee statute apparently contemplated that the bond to be presented to the court there, should be the same: — one given here, and that the conditions specified would be in one bond. But the form of the guardian's bond prescribed by the Missouri statute was not broad enough to meet that of the Tennessee statute; and in fact the bond for the purpose of securing the transfer, coming into existence after and upon the giving of the ordinary guardian's bond, this would not contain the additional recitation required by the foreign statute. The fact, therefore, that the bond in question was a separate bond was a necessity; and because it contained more or fewer recitals than, or differed in mere form from that indicated by the latter statute, would in no manner impair its validity. The authorities in support of this proposition are uniform. *U. S. v. Bradley*, *supra*; *Ring v. Gibbs*, 26 Wend. 510. "Although the condition of a bond may not embrace everything required by the act of assembly to be stipulated, nevertheless, a judgment may be rendered on it to the extent of the condition, or commensurate with the undertaking of the party." *Triplet v. Gray*, 7 Yerg. 17; *Nunn v. Goodlett*, 5 Eng. (Ark.) 89; *Pratt v. Wright*, 13 Gratt. (Va.) 175; *Flint v. Young*, 70 Mo. 221, 225, 226.

This bond is not essentially collateral or auxiliary to the first guardian's bond. *Haskell v. Farrar*, 56 Mo. 497; 7 —: —. *State ex rel. Riggs v. Colman*, 73 Mo. 684; *State ex rel. v. Steele*, 21 Ind. 207. It was optional with

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the relators to which security they would resort. *Wood v. Williams*, 61 Mo. 63. There can be but one satisfaction, but the ward may pursue all his remedies until fully paid. *State to use, etc., v. Drury*, 36 Mo. 281. Superadded to this is the conceded fact that all the parties to the original guardian's bond are insolvent, so that a resort to that bond in the first instance would have been unavailing.

The learned counsel for appellants suggest that when the guardian charged himself with the wards' money obtained in Tennessee, in his annual settlements, ^{8. ———: meaning of "account for."} that was a compliance with the conditions of the bond; the breach assigned in the petition being a failure, etc., "to account for" this money. This is not all that is embraced in this term "account for." It is a condition not satisfied short of paying over the trust fund to the *cestui que trust*. *State ex rel. v. Colman, supra*; *State ex rel. v. Steele, supra*. The sureties in this bond by signing it enabled their principal to get these children's patrimony out of the orphans' court in Tennessee, where it was secure, and they should in law and morals make good their pledge.

The judgment of the circuit court was right, and the same is affirmed. MARTIN, C., concurs; WINSLOW, C., not sitting, having been of counsel.

CALDWELL V. WHITE, *Appellant*.

Judgments, AS RES ADJUDICATA. A party to an action who suffers judgment to go against him, cannot in a subsequent proceeding, either in equity or at law, cause such judgment to be reviewed by an allegation of the same facts which were adjudged insufficient, when set out in his answer, as a defense to the former action.

Appeal from Shelby Circuit Court.—HON. JOHN T. REDD, Judge.

REVERSED.

Anderson & Boulware for appellant.

Jewett for respondent.

NORTON, J.—In 1857, plaintiff, Wm. D. Caldwell, executed his promissory note to Samuel B. Caldwell, his father, for \$809. Payments indorsed thereon prevented the running of the statute of limitations. After the death of said Samuel B., said note came to the hands of defendant White, his executor, as assets. Said executor, White, brought suit on the note to November term, 1874, of Shelby circuit court against said Wm. D. Wm. D. filed his answer in said suit, alleging in substance that said note was executed by him for money borrowed of the testator; that the said money belonged to Nancy J. Caldwell, the wife of testator, and had come to her from her father's estate; that said testator held the same for the use and benefit of said Nancy J.; that said Nancy J., after the death of said Samuel B., had by her writing, in consideration of natural love and affection and of the sum of \$200 by said Wm. D. paid to said Nancy J., relinquished said note and the indebtedness evidenced thereby to him, said Wm. D. White filed a demurrer to said answer; the ground of demurrer being that the facts stated therein were not sufficient to constitute a defense to the action. The court sustained the demurrer, and the defendant therein, Wm. D. Caldwell, declining to further plead, rendered judgment for the amount of said note and interest and for costs. The said judgment for costs said defendant thereafter paid off. Afterward said Wm. D. Caldwell, defendant in said suit, brought this suit in said circuit court of Shelby county, against said White, executor, and said Nancy J. Caldwell, as defendants. In his petition he set out the same facts set up in his answer in the prior suit against him, and further alleged that he had so pleaded them in his answer in said prior suit, and that said White, executor therein, demurred to his said answer on the ground that said facts constituted

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no defense to said action, and further alleged that the court sustained such demurrer, and rendered judgment in favor of said plaintiff therein; and he prayed that said executor be enjoined from the collection of said judgment and that he be decreed to enter satisfaction thereof. Said defendant, Nancy J. Caldwell, filed no answer to said petition, and set up no claim to said indebtedness or judgment. Defendant White, executor, answered, denying all the substantive allegations of the petition, and pleading the judgment of the court in the former case as an adjudication of the matter set up in the bill. Upon the hearing defendant White objected to the introduction of any evidence on the part of plaintiff, on the ground that the petition did not state facts sufficient to constitute a cause of action. This objection the court overruled, and defendant White duly excepted.

We are of the opinion that the court erred in overruling defendant White's objection to the introduction of evidence, for the reason that it clearly appears on the face of the petition that the very same matters set up in plaintiff's petition and sought to be litigated, were set up, litigated and passed into judgment in a former suit brought by defendant White, as executor, against Samuel B. Caldwell, defendant in that suit, and plaintiff in this. It is well settled that when a party to an action, being fully apprised of his rights, suffers judgment to go against him either in whole or in part, he cannot in a subsequent proceeding, either at law or in equity, be allowed to re-agitate questions which were or should have been adjudicated at the former trial. *Shelbina Hotel Asso'n v. Parker*, 58 Mo. 327. This principle applies in the present case, as plaintiff in this suit relied in the former suit against him on a defense, upon which he now relies as giving him a cause of action, and the judgment rendered against him in the former suit cannot be reviewed in a proceeding instituted by him as plaintiff wherein he builds his rights of action upon the same facts

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which had been adjudged to be insufficient as a defense against a recovery in the former suit.

Under this view of the case, judgment must be reversed and plaintiff's bill dismissed, in which all the judges concur.

GREENABAUM, *Plaintiff in Error*, v. MILLSAPS.

Instructions: MUST APPEAR IN THE RECORD. Unless the instructions given for respondent appear in the record, this court cannot inquire into the correctness of the action of the trial court in refusing instructions asked by appellant.

Error to Saline Circuit Court.—HON. WM. T. WOOD, Judge.

AFFIRMED.

Philips & Jackson for plaintiff in error.

Davis & Willis for defendant in error.

SHERWOOD, J.—We are prevented from any examination into the propriety of refusing the second and third instructions asked by the plaintiff, by reason of the fact that the instructions given for the defendants are not preserved in the bill of exceptions. What those instructions were we can only conjecture. Presumptively they embodied correct views of the law, and besides, the instructions given on behalf of the defendants, may have covered the ground embraced in the instructions refused the plaintiff.

Therefore judgment affirmed. All concur.

FARRELL V. THE UNION TRUST COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK: SUFFICIENCY OF COMPLAINT.** The complaint in this case, an action upon the statute to recover double damages for killing stock, examined, and *Held* to contain averments sufficient after verdict to show that the stock entered upon the track at a point not within the limits of an incorporated town or city.
2. ———: ———: **TRUSTEES.** The trustee of a railroad company, running and operating in that capacity a railroad within this State, is liable for injuries to animals, under section 809, Revised Statutes 1879.

Appeal from Monroe Circuit Court.—HON. JOHN T. REDD,
Judge.

AFFIRMED.

Smith & Krauthoff and *Thomas J. Portis* for appellant.

F. C. Farr for respondent.

HENRY, J.—This action was instituted before a justice of the peace, and the following is the statement of the cause of action filed:

“The plaintiff states that the defendant, the Union Trust Company of New York, is a corporation incorporated under and by the law of New York, and as such, on or about the 24th day of July, 1878, said company, as trustee for the Missouri, Kansas & Texas Railroad Company, under the laws of the State of Missouri, had possession of and was operating a railroad running in and through Monroe county, Missouri, known as the Missouri, Kansas & Texas Railroad, and that said railroad ran through and along an inclosed field of plaintiff's in Marion township, in Monroe county, Missouri; that defendant, on the day and year aforesaid, had wholly failed and neglected to erect or maintain good and substantial fences along the sides of its said railroad where the same so passes through and along said inclosed field, as defendant was required to do under the

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law of the State of Missouri in such cases made and provided; that by reason of such failure and neglect of the defendant to erect and maintain fences as aforesaid, a certain roan horse of the value of \$80, a certain brown horse mule of the value of \$80, a certain mouse-colored mare mule of the value of \$35, and a certain mouse-colored horse mule of the value of \$40, all then and there being the property of the plaintiff, got on the track of the said railroad, so operated by the defendant, on or about the 25th day of July, 1878, and the defendant on the day and year last aforesaid, by its agents, servants and employes, while running its engines and cars along and over the track of its said railroad, in said township of Marion, in Monroe county, and in and through plaintiff's said inclosed field, ran its said engines and cars against and upon said horse and three mules, and thereby then and there killed said horse and three mules, so that they were wholly lost to plaintiff; that said horse and mules were so killed at a point on said railroad which was not inclosed by a good and substantial fence, and at a point on said railroad that was not a public crossing, and a point within the inclosed field of plaintiff, as aforesaid."

On a trial in the justice's court plaintiff had judgment, from which defendant appealed to the circuit court of Monroe county, where plaintiff again obtained a judgment, from which this appeal is prosecuted.

One of the points relied upon for a reversal is, that the statement is defective in not alleging that the animals killed entered upon the track of the railroad at a point not within the limits of an incorporated town or city. It is alleged that they entered upon the track where it ran through plaintiff's inclosed field, in Marion township, and it is fairly inferable from the statement, that the field was not within the limits of an incorporated town or city. This, after verdict, must be held a sufficient averment of that fact. Besides, if the killing had occurred within the limits of a town or city,

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whether in an inclosed field or not, the action could not be maintained under the 43rd section of the Corporation Act, but should have been based upon the 5th section of the Damage Act. *Elliott v. Hann. & St. Jo. R. R. Co.*, 66 Mo. 688. This suit was based upon the 43rd section. The petition states the facts which bring the case within the provisions of that section, and this, in connection with the fact above noticed, sufficiently averred the fact which it is alleged was omitted, especially after verdict.

It is also contended that in no event is the defendant liable under the 43rd section, because it is penal in its nature, and by its terms applies only "to ^{trustees.} railroad corporations formed or to be formed in this State," and "corporations to be formed under this article," and "railroad corporations running or operating any railroad in this State." The Union Trust Company of New York, it is alleged, is a corporation formed under the laws of New York, and it is not alleged that it is a railroad corporation, but it is sued as, and averred to be, "trustee for the Missouri, Kansas & Texas Railroad Company," and in that capacity was running and operating the road. In *Turner v. Hann. & St. Jo. R. R. Co.*, 74 Mo. 602, it was held that for an injury inflicted by a train of cars passing over that road, while in the hands of a receiver who was managing and operating it to the exclusion of the company, the latter would not be liable. It was not expressly decided that the receiver would be, but we see no reason why he should not. He stands in the place of the company, represents the company, and while, not directly, the railroad company is ultimately responsible, because damages recovered against the receiver in such a case, he may charge to the company in his settlement. *Shearman & Redfield on Neg.*, § 76. If the defendant in this case is not responsible, then it were an easy matter for a railroad corporation to avoid all the duties imposed upon it by the statute, by simply transferring the road to a

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trustee, to run and operate it for the benefit of the company.

The judgment is affirmed. All concur.

ALLEN V. McMONAGLE, *Appellant*.

1. **Justices' Courts: COMPLAINT: APPEAL TO CIRCUIT COURT: AMENDMENT: CONVERSION.** A statement filed in a justice's court was in the following form: "J. McM. Dr. to S.W. A., To nine sheep, \$25." *Held*, (1) That this was a sufficient statement of a claim for the conversion of the sheep; (2) That it was proper to allow the plaintiff, when the case reached the circuit court, to file an amended statement setting out his claim more fully.
2. **Conversion.** Any wrongful taking or assumption of a right to control or dispose of property constitutes a conversion. Any wrongful act, which negatives or is inconsistent with the plaintiff's right, is *per se* a conversion.

Appeal from Caldwell Circuit Court.—HON. E. J. BROADDUS,
Judge.

AFFIRMED.

Action commenced before a justice of the peace on the following account: "1879, John McMonagle Dr. to S. W. Allen, To nine head of sheep, \$25." In the justice's court there was no other statement of plaintiff's cause of action. In the circuit court, against the objection of defendant, the court gave plaintiff leave to file, and he did file, the following as an amended statement:

Plaintiff states that on or about the 29th day of June, 1879, he was owner of nine head of sheep, of the value of \$25; that at said last date the defendant wrongfully, and without leave, converted the said sheep by depriving plaintiff of the use and permanent dominion over them, and to the exclusion and defiance of plaintiff's right to said sheep, to his damage, etc.

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To support the issues on his part plaintiff introduced evidence tending to show that nine of his sheep strayed off and joined defendant's flock at defendant's farm, and were fed with his sheep, and were permitted to remain with them until sheep buyers from Kansas bought defendant's flock; that when defendant sold his flock plaintiff's were intermingled with defendant's sheep, and that defendant knew that the purchasers were going to drive plaintiff's sheep to Kansas and convert the same to their own use; and that defendant consented to the taking them away for that purpose, and assisted in driving the flock, which embraced plaintiff's sheep, off his place, and along the road for a mile or so; also, that he took the address of the purchasers, who said to him that if any one came to him about the sheep, and he would write to them, they would send back pay for such sheep.

The court, at the instance of plaintiff, gave the following instructions:

1. If the jury find from a preponderance of the evidence that defendant delivered his flock of sheep to the parties to whom he sold, and that he delivered plaintiff's sheep at the same time and place, knowing that said parties were taking the same to drive away, or out of the state, then they will find for plaintiff, etc.

2. If the jury shall believe that plaintiff had sheep at defendant's and running with his flock, and that defendant sold his own flock to men to take to Kansas, and, as an inducement to sell his own sheep, permitted said men to take plaintiff's sheep along with his own, so sold, or informed them that they could take plaintiff's sheep or not, as they saw fit; and said men did take along said sheep, then this is in law a conversion of the sheep of plaintiff by defendant, and the jury will find for plaintiff, etc.

The defendant asked the court to give each of the following instructions:

1. The jury are instructed that as plaintiff's sheep were trespassers on defendant's farm, defendant had the

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right to drive them from his farm, or to cause them to be driven off by others.

2. If plaintiff's sheep were taken away and converted by the parties from Kansas, and defendant knew that said parties were taking said sheep away, defendant would not be liable unless he aided, assisted or encouraged said parties to take them away.

3. If the jury find from the evidence that the defendant sold to the Kansas parties his own sheep, which were at the time in defendant's field, along with the strays mentioned in the evidence; and if the jury further find from the evidence that the Kansas parties, while one of them was paying defendant for his sheep, went to the field and turned out [] into the road the sheep that they had bought of defendant, and took along at the same time the strays, the jury are instructed that such conduct would not constitute a delivery or conversion of the strays by the defendant, and the jury must find for the defendant, unless they further find that defendant aided, assisted or encouraged said parties to take away said strays.

The court gave instruction numbered two, but refused to give instructions one and three. The court then modified instruction three as asked by defendant, by inserting in the same, at the point indicated by the bracket, the following words: "without the consent of the defendant;" and, after modifying the instruction gave the same. There was a verdict and judgment for plaintiff, and defendant appealed.

Crosby Johnson for appellant.

The suit in the justice's court was a suit upon an account. There was nothing stated from which a tort could be inferred. The amended statement presents an action of trover. The causes of action are not the same. *Clark v. Smith*, 39 Mo. 498; *Beattie v. Hill*, 60 Mo. 72; *Lumpkin v. Collier*, 69 Mo. 170; *Razor v. R'y Co.*, 73 Mo. 475. Instruc-

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tion two, given for plaintiff, is erroneous. Defendant was under no obligation to actively exert himself to protect plaintiff. He could remain passive without making himself responsible. A declaration that they might take them or not, as they saw fit, amounted to nothing more than a declaration that he intended to remain passive; that he did not intend to interfere actively to encourage or prevent it. The fact that he knew a trespass was intended does not make him liable. He would not be liable unless he encouraged or assisted in the trespass. Assent is only sufficient when the trespass was committed for the benefit of the party charged. *McManus v. Lee*, 43 Mo. 206.

Ross for respondent.

SHERWOOD, J.—The case of *Hale v. Van Dever*, 67 Mo. 732, is decisive of the sufficiency of the statement filed with the justice, or if that were insufficient, of the right to amend the statement in the circuit court; that such amendment did not change the cause of action.

Taken as a whole, we discover no objections to the instructions given, and no error in refusing those which were refused. There was evidence sufficient to go to the jury, tending to show a conversion. Any wrongful taking or assumption of a right to control or dispose of property, constitutes a conversion. Any wrongful act, which negatives or is inconsistent with the plaintiff's right, is *per se* a conversion. *Williams v. Wall*, 60 Mo. 318; *State v. Berning*, 74 Mo. 87. Therefore, judgment affirmed. All concur.

Heltzel v. The Kansas City, St. Louis & Chicago Railroad Company.

HELTZEL V. THE KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY *et al.*, Appellants.

1. **Railroads : LIEN FOR MATERIALS : SERVICE OF NOTICE.** A party seeking to enforce a lien against a railroad for materials furnished in its construction, in the absence of all the officers of the company caused a notice of his claim to be served on a person who had desk-room in the office of the company, but no connection with its affairs. *Held*, that this was not service upon the company, and did not, therefore, fulfill the requirements of section 3202, which makes the service of such notice upon the company an essential prerequisite to a lien.

Appeal from Audrain Circuit Court.—HON. G. PORTER, Judge.

REVERSED.

Macfarlane & Trimble for appellants.

S. M. Smith for respondents.

NORTON, J.—This suit was commenced under section 3200, Revised Statutes, and sections following, to establish and enforce a lien against the Kansas City, St. Louis & Chicago Railroad Company, for cement sold by plaintiff to Reid & Taylor, sub-contractors in building said road, to be used in the construction thereof. The petition alleges the sale and delivery of several lots of cement amounting in the aggregate to the value of \$540, the first lot of which was delivered on the 31st day of May, 1878, and the last the 9th day of September, 1878. It also alleges the filing of the account sued upon in the office of the clerk of the Audrain circuit court within ninety days after the indebtedness accrued, and also service of notice within ninety days after the incurring of the debt, and the commencing of the suit within ninety days after filing said account. The answer was a general denial, and on the trial plaintiffs obtained judgment for \$503, which was declared to be a lien

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on said road. From this defendant has appealed, and the chief ground relied upon for reversal of the judgment is that defendant corporation was not served with notice in the time and manner required by law.

The question as to the sufficiency of the service of notice was raised on the trial by defendant objecting to the introduction in evidence of the following service, viz: "Served this notice in the city of St. Louis on the 7th day of October, 1878, by delivering a copy thereof to Robert Park in the office of the Kansas City, St. Louis & Chicago Railroad Company, he having charge of said office, the president or other chief officer of said railroad company being absent from the city and could not be found."

The question as to the manner of serving notices on domestic corporations, so as to create a lien for materials furnished to a contractor to be used in constructing its road, was before this court in the case of *Heltzell v. Chicago & Alton R. R. Co.*, ante, p. 315, and it was held that in the absence of any statute prescribing the manner of serving such notices, the service should be made on the chief officer or managing agent of such corporation, and when it cannot be had on either of such officers, service on any officer whose official relations to the governing body, or managing agent or chief officer of the corporation, would make it his duty to communicate such notice to such body, agent or officer.

Testing the above service offered in evidence by the rule laid down in that case, we must hold it to be wholly insufficient, because it does not appear upon the face of the notice that Robert Park, upon whom it was served, was an officer of said company, or sustained any official relations whatever either to the company, its managing agent or chief officer, nor was it attempted to be shown by other evidence that he had any connection with the company or its officers, but, on the contrary, it was shown that said Park was the secretary of the Louisiana & Mississippi River Railroad Company, and occupied as such a desk in the office of the

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defendant corporation, and that he had nothing whatever to do with the business of the defendant corporation, except that he had desk-room in the office. The court erred in overruling defendant's objection to the sufficiency of said service and receiving it in evidence, and for this error the judgment will be reversed and cause remanded. All concur.

ROACH, Appellant, v. THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS.

1. **St. Louis: "COMMON SCHOOLS."** The Board of President and Directors of the St. Louis Public Schools has control over its school funds unaccompanied by any conditions as to the kind of schools which it shall maintain, or the character and nature of the studies which it shall prescribe or allow.

In the legislation of this State, the phrase, "common schools," means schools open and public to all, rather than schools of any definite grade, and the term "school," by and of itself, does not imply a restriction to the rudiments of an education.

2. **Public Schools: LIMITATION AS TO AGE OF PUPILS.** The first section of article 10 of the Constitution of 1875, requires instruction to be given gratuitously to all persons in the State between the ages of six and twenty years. The sixth section declares that the public school fund "shall be faithfully appropriated for establishing and maintaining the free public schools * * * in this article provided for, and for no other uses or purposes whatever." *Held*, that the two sections, construed together, require free public schools for all persons between the ages of six and twenty years, but prohibit gratuitous instruction from the public school fund to children under the age of six years.

Appeal from St. Louis Court of Appeals.

REVERSED.

Charles Gibson, E. P. Johnson and H. S. & T. M. Lipscomb for appellant.

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Everett W. Pattison and Leo Rassieur for respondent.

RAY, J.—This is a petition in the nature of a bill of injunction against the Board of President and Directors of the St. Louis Public Schools, the object of which is to restrain the defendant from expending its revenues and resources in teaching in the schools the languages, arts, sciences and various enumerated branches of education therein specified, and also from admitting into said schools and teaching therein children under six years of age, on the ground that expenditures for said purposes are illegal and unauthorized and the damage thereby done irreparable. The plaintiff in the cause is a resident and a tax-payer in said city, and the defendant a corporation duly created and established in said city for the purposes of public education. To this petition a demurrer was successfully interposed in the circuit court, and the plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which affirmance the plaintiff appeals to this court. The court by sustaining the demurrer held that it was not illegal for the defendant to expend its means for either of the purposes indicated in the petition, and this is assigned for error.

It is contended for plaintiff, first, that the schools in charge and control of defendant are common schools, where only the rudiments of an English education can lawfully be taught, and that it is not competent for the defendant to expend its revenues in teaching the branches of learning mentioned in the petition; second, that children under six years of age cannot rightfully be admitted or instructed in said schools. On the other hand, it is insisted by defendant, first, that no such restriction is imposed on the power of its school board, and that its schools are public schools, for the education and instruction of its pupils in such knowledge and intelligence as may be necessary to render them good and useful citizens; second, that the

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provision for the gratuitous instruction of all persons in the State between the ages of six and twenty years, is a requirement only, and not a prohibition.

The petition states that congress, in 1831, granted certain lots, town lots and common field lots, to the inhabitants of the city of St. Louis (then a village) for the support of schools therein, to be disposed of for their use, according to the laws of the State, in such manner as the legislature thereof might direct; that by various other acts of congress and the general assembly of the State, passed from time to time, there were granted to said inhabitants for said purpose large and valuable tracts of land, and the proceeds of the sale thereof, and that large sums of the public revenue and other resources of the State were also granted to said inhabitants and to said defendant for the support of schools, as aforesaid; that in pursuance of said acts of congress, the general assembly of the State of Missouri, by an act approved February 13th, 1833, entitled "An act to establish a corporation in the city of St. Louis for the purposes of public education," and by other acts, amended and supplemented the same, by which all free white persons residing within the limits of said city, as the same then existed, or might thereafter be established by law, should be, and were thereby, constituted a body politic and corporate by the name and style of "The Board of President and Directors of the St. Louis Public Schools," etc., whereby the custody, disposition, application and expenditure of all said funds, as well as the charge, control and conduct of said schools were and are fully committed to the care and direction of the defendant for the purposes of public education in said city, subject only to such rules, ordinances and statutes as the defendant might make in that behalf, not inconsistent with the laws of the land.

From these averments of the petition it appears that the school funds of the defendant, from whatever source

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1. ST. LOUIS com- derived, were originally granted for the sup-
mon schools." port of schools, unaccompanied by any con-
dition, express or implied, that said schools should be
restricted to teaching the elementary branches of an En-
glish education. The power of prescribing which shall or
shall not be taught in said schools rests with the legislature
of the State and not with the courts. The legislature may,
from time to time, exercise this power and make such
modifications and changes as in its wisdom and discretion
may seem fit and proper for the purposes of the grant,
subject only to the constitution of the State. This right
has often been exercised, as the history of legislation on
this subject abundantly testifies. The term "common"
when applied to schools, is used to denote that they are
open and public to all, rather than to indicate the grade of
the school or what may or may not be taught therein. In
the legislation on this subject they are called "public" as
often as common schools. These terms seem to be used
interchangeably as meaning one and the same thing.

The term "school," *ex vi termini*, does not imply a re-
striction to the rudiments of an education. When con-
trasted with the term "college" or "university," it may
and ordinarily does imply a lower grade, but just where
the one ends and the other begins, may not be easy to de-
fine. There is, in fact, as we all know, a great difference
in the extent of education and range of learning that may
be and often is taught in what are properly called common
or public schools. There is also a wide difference between
the range and extent of learning and erudition taught in
different colleges, seminaries and universities. So far as
the city of St. Louis and its schools are concerned, it ap-
pears by the petition that the power and control over the
school fund, primarily bestowed upon the legislature by
the original grants, has by it been conferred upon and con-
fided to the defendant by its charter. So far as the kind
of school or the character and nature of the studies therein
is concerned, the charter, like the grants, is unaccompanied

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with any conditions, express or implied. That whole subject is confided to the care and discretion of the defendant, subject only to the laws of the land, and we fail to see in what manner or particular these laws are violated. Indeed, the fundamental law of the land, (§ 1, art. 11, Const.,) in effect expressly declares that a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, and to that end enjoins the establishment and maintenance of free public schools for gratuitous instruction throughout the State. The first point made by the plaintiff, therefore, is not well taken. In that particular the petition shows no cause of action, and to that extent the action of the court in sustaining the demurrer is affirmed.

As to the second point, we think differently. The provisions of the 1st and 6th sections of article 11 of the constitution of the State, taken together, are
2. PUBLIC SCHOOLS: limitation as to age of pupils. conclusive on this point. The 1st section in effect declares that all persons in the State between the ages of six and twenty shall be gratuitously instructed in the free public schools therein provided for, and the 6th section in like manner declares that the "public school fund," therein mentioned, shall be faithfully appropriated for establishing and maintaining the "free public schools" provided for in said article, and for no other uses or purposes whatsoever. The two sections, taken together, amount to both a requirement and a prohibition. By the first, free public schools for the gratuitous instruction of all persons in the State between the ages of six and twenty are required, but by the sixth, the funds thus dedicated to that use are prohibited from being expended for any other uses or purposes whatsoever. The expenditure by the defendant of its revenues for the purpose of admitting and instructing in said schools children under the age of six years, is a use of its funds not authorized, but forbidden, by the constitution, and in this particular the petition did state a cause of action, and to that extent the action of the

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court in sustaining the demurrer was error, and its judgment in this particular is reversed and the cause remanded for further proceedings in conformity to this opinion. The authorities cited in brief of counsel properly considered, furnish no just cause for conclusions different from those reached in this opinion. All concur.

BRANSON V. TURNER, *Appellant*.

1. **Warranty of Chattels: OBVIOUS DEFECT.** Though a defect be obvious a vendor may warrant against it; especially where the nature and extent of the disorder is lurking, and may reasonably be supposed to be more within the knowledge of the vendor than the vendee. Thus, where the subject of a sale was a yoke of oxen, one of which had a sore on his neck, and the vendor gave the assurance that "that don't hurt him; it is almost well," and the vendee took them on this assurance, without seeing them; *Held*, that this amounted to a warranty.
2. — : BREACH OF WARRANTY. Where there is a breach of warranty, the vendee may return the property and rescind the contract within a reasonable time, or he may retain it and when sued for the purchase money plead a total or partial failure of consideration.
3. — : — : RECOURPMENT. Notwithstanding a breach of warranty, if the property is not returned the vendor may maintain an action for the purchase money, but the vendee will be entitled to recoup the amount of the diminution in value.
4. — : — : BURDEN OF PROOF. In an action on a contract of sale with warranty to recover the purchase money, the burden is not on the vendor to show fulfillment of the warranty, but on the vendee to show a breach if he alleges it.
5. — : — : FRAUD. To make out a breach of warranty, it is not necessary to show that the representations of the warrantor were fraudulent or that they actually deceived and misled the warrantee.
6. **Expert Testimony.** Whether or not a sore on the neck of an ox renders him unfit for beef, is a proper question for expert testimony.
7. **Warranty.** Where a vendor of oxen warranted them fit for either beef or work, unfitness for either, is a breach of the warranty, whether the vendee designed to use them for that purpose or not.

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Appeal from Gasconade Circuit Court.—HON. A. J. SEAY,
Judge.

REVERSED.

Belch & Silver for appellant.

Burchard & Read for respondent.

PHILIPS, C.—This action was begun in a justice's court, and tried on appeal in the circuit court, to recover the purchase money for a yoke of oxen sold by respondent to appellant. The whole negotiation seems to have been conducted by correspondence, and is evidenced by the following letters:

WOODLAND, Mo., January 27th, 1878.

MR. TURNER: A few lines in regard to you about some steers I have to sell. I have one of the finest yoke of steers almost in Gasconade county, and the finest matches, big and very fat. I have been stall-feeding for some three or four months, and will sell them cheap for beef or work steers. They will weigh 1,200 pounds. One of them has a sore under his neck down close to his jaw, but that don't hurt him; it is most well. I will pay your expenses up here if you will buy the steers. Come up and see them, and there are some more steers here for sale, but you find none better for work than mine. Yours,

THOS. J. BRANSON.

MORRISTON, Mo., February 2nd, 1878.

MR. T. J. BRANSON, Woodland, Mo.:

Dear Sir: If your cattle are as good as represented, you can deliver them to me about the 25th of this month. I will pay you cash on delivery, \$75. Answer by return mail and oblige.

Yours,

C. C. TURNER.

On this letter from Turner, Branson delivered the cat-

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tle. Branson owned a saw mill, and there was evidence that he bought them to use in hauling at this mill; and that he used them once. There was also evidence tending to show that the sore on the steer's neck was material, affecting the value of the steers. Appellant offered to prove by experts that the sore on the neck rendered him unfit for beef; which proof the court excluded. The parties lived thirty miles apart. About two weeks after the delivery of the cattle, Turner started them back to Branson, though it does not appear that they were delivered to him.

On this state of the case plaintiff asked the following instructions, which the court gave :

1. If there was a contract of sale, the terms of which were contained in Branson's letter of January 27th, 1878 together with Turner's answer of February 2nd, 1878, and you are satisfied that plaintiff Branson, by himself or agent, performed all the conditions of such contract on his part, then he is entitled to recover the price agreed on, if you believe the cattle were as represented in plaintiff's letter to defendant.

2. If in pursuance of a letter from defendant containing a proposal to purchase the cattle in controversy, the plaintiff, or his agent, delivered said cattle to defendant at the time and place mentioned in said letter, or had such cattle at such time and place ready to deliver, and offered to deliver them to defendant, then defendant is bound to pay the price agreed upon, whether he accepted and received them or not, provided that the cattle were such as they were represented to be in plaintiff's letter to defendant of January 27th, 1878.

3. If the jury believe that the plaintiff, or his agent, delivered to defendant the cattle in controversy, and that they were accepted and received by him, they will find for plaintiff the price agreed upon, unless they further believe that plaintiff made false and fraudulent representations in regard to the cattle which actually deceived and misled defendant to his injury.

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4. If the defendant Turner used the oxen in controversy as his own, or exercised over them the rights of ownership after they were taken to Morriston by plaintiff's brother for the purpose of delivery, these are circumstances from which you may infer they were accepted and received by defendant.

Defendant asked the following instruction, which was given :

1. The jury is instructed that the terms of the contract are, that the plaintiff, by his letter dated January 27th, 1878, offered to sell to defendant a yoke of cattle, almost the best in Gasconade county, and the finest matches, big and pretty fat, and offered to sell them for beef or work steers, weighing about 1,200 pounds, one of them with a sore under his neck, that the sore doth not hurt him, and is almost well, and the defendant agreed to purchase the same provided they were as good as represented, and that the defendant was not under this contract bound to receive the same unless the steers came up to this description, and it devolves on the plaintiff to prove this, and in the absence of this evidence the jury will find for defendant.

The defendant also asked for the following instructions, which were refused :

2. It devolves on the plaintiff to prove to your satisfaction that the steers were as represented by plaintiff, and in the absence of such proof, you must find for defendant.

3. If the jury believe from the evidence that the sore on the neck was not nearly well, but was liable to continue as a sore, then the plaintiff cannot recover, although the same did not materially injure him as a work ox.

4. If the sore on the neck of one of the steers decreased the value of the same for any purpose, then the plaintiff cannot recover on his contract.

5. Although the jury may believe from the evidence that plaintiff agreed to sell defendant a yoke of oxen on the conditions mentioned in his letter, and deliver the same

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to the defendant, and that defendant afterward found that the oxen were not as represented and returned the same to the plaintiff, and the plaintiff received the same without objection, and still holds them, then this is a rescission of the contract, and the plaintiff cannot recover.

There was a verdict and judgment for plaintiff for the whole purchase money, and the defendant appealed to this court.

The questions presented for determination are the giving and refusing of instructions, and the exclusion of evidence.

The negotiation between the parties to this contract having been conducted in a written correspondence, without
1. WARRANTY OF CHATTELS: obvious defect. a view of the steers, reference to the letters must control its meaning. The vendor, after representing the condition of the animals, said he was willing to "sell them cheap for beef or work steers." Had there been nothing more, and the vendee had received and retained them for two weeks with the sore on the neck as an obvious defect, I should be inclined to hold that this defect was not such a breach of the alleged warranty, as, under such a state of facts, would entitle the vendee to return the steers. But a vendor may warrant against an obvious defect. Benjamin on Sales, (3 Ed.) §§ 616 *et seq.* Especially is this so, where the nature and extent of the disorder is lurking, and may reasonably be supposed to be more within the knowledge of the vendor than the vendee. *Thompson v. Botts*, 8 Mo. 710. Branson in his letter went further. He was not content with calling attention to the sore on one of the steers, but gave the assurance that "that don't hurt him; it is most well." This amounted to a warranty. Turner, in answer to this, said: "If your cattle are as good as represented you can deliver them." By delivering them, without more, on this letter, the warranty was complete.

If the cattle on trial and further investigation proved to be otherwise than, as warranted, the vendee had two

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2. ———: breach of warranty. remedies. He could have returned the property to the vendor, provided he acted seasonably, and rescinded the contract; or he could have retained the same, and when sued for the purchase money pleaded a total or partial failure of consideration. The evidence showed "that the injury on the neck was a material injury affecting the value of the steer." This, if true, authorized a rescission of the contract. The cattle were worked only once; and two weeks was not an unreasonable time to allow the vendee, under the circumstances, to return them to the vendor and demand a rescission.

The evidence of their return and delivery to Branson was not sufficient to authorize the jury to find the fact of such return. It only showed that Turner started a man with them to so deliver them, and they were afterward found in the woods near Branson's, who knew they were there. This could have well consisted with the fact that the bailee of the vendee might have driven them merely into this neighborhood and turned them loose, without informing the vendor. The burden as to the re-delivery resting on the vendee, his proof was not sufficient, in my opinion, to authorize the submission of this question to the jury; and all instructions predicated thereon were properly refused.

But on the other hand, if by reason of the breach of warranty the cattle were rendered less serviceable or value-
 3. ———: ———: able to the vendee, he was entitled to recoup-
 recoupment. out of the purchase money the amount of the diminished value. The trouble with the defendant's second, third and fourth instructions is, that they assume all the way through that the steers were, in fact, returned, and declare that the plaintiff could not recover anything at all, if there was a breach of the warranty. Treating the re-delivery as out of the case, it did not follow that the plaintiff could recover nothing, if there was a false representation or breach of contract. So the second, third and fourth instructions were rightly refused.

The first instruction given for defendant, like the second, was faulty in declaring, in effect, that the burden
 4. ———: ———: rested on the plaintiff to prove that the war-
 burden of proof. ranty was good. When he showed the sale and delivery to the defendant, if the defendant claimed a failure of consideration, total or partial, consequent upon a breach of the warranty, he held the laboring oar as to this issue.

The instructions given by the court on behalf of plaintiff would have been unobjectionable, but for the third. It
 5. ———: ———: tells the jury on a certain state of case to
 fraud find for the plaintiff, "unless they further believe that plaintiff made false and fraudulent representations in regard to the cattle, which actually deceived and misled defendant to his injury." On what was the jury to predicate such belief? It ought to be founded on the evidence; but this instruction does not say so. If there was an express warranty, it was not necessary that there should have been "fraudulent representations," nor that defendant should have been "actually deceived and misled." He had a right to rely on the letter of warranty. This instruction was misleading and amounts to error.

As to the evidence excluded: The record recites that
 "the defendant offered to prove by experts that the sore
 6. EXPERT TESTI- on the neck rendered him (I presume the
 MONY. steer, not the defendant) unfit for beef." This proof the court excluded. The probabilities are that the witnesses thus offered were not experts under a proper judicial test. But there is no evidence on this qualifying point preserved to enable us to pass on that question. On the contrary, the record recites that the proof offered was "by experts." There could be expert testimony on such a fact. 1 Wharton Ev., § 444. If the point sought to be established was admissible, the evidence offered "by experts" was competent.

But respondent contends that the evidence was inadmissible, because it only went to the point that the sore

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7. **WARRANTY.** rendered the steer "unfit for beef," whereas, as he claims, the appellant bought him only for work. As the contract between the parties was evidenced by writing, and was completed by the delivery of the property, the warranty covered both the qualities of beef and work; and although the purchaser, when he bought may have designed in his own mind, uncommunicated, to use them for the one purpose or the other, it was no concern of the vendor, who sold them as fit for either. Under the terms of the sale the purchaser may have designed to work the steer for the present, and then put him on the market for beef. Under proper instructions the trial court could guide the mind of the jury in the matter of assessment of damages or reduction of value consequent upon the diminution on either ground.

For the foregoing reasons the judgment of the circuit court is reversed and the cause remanded for re-trial. All concur.

THE STATE, *Appellant*, v. WEEKS.

1. **Criminal Law: ASSAULT: INDICTMENT.** An indictment charged substantially that defendant, at, etc., "feloniously one John Key with large stones, and did beat, wound and inflict great bodily harm on him the said Key." *Held*, not obnoxious to the charge of being vague, uncertain, illegible and unintelligible, although it also contained some useless verbiage, and was otherwise inartificially drawn.
2. —: **DEMURRER.** A motion to quash, or a demurrer to, an indictment, which only alleges that the indictment does not set forth any offense, is sufficiently specific under section 1818, Revised Statutes of 1879. In so far as they declare otherwise, the following cases are overruled: *State v. Houten*, 37 Mo. 357; *State v. Berry*, 62 Mo. 595, and *State v. Poston*, 63 Mo. 521.

Appeal from Howell Circuit Court.—HON. J. R. WOODSIDE,
Judge.

REVERSED.

D. H. McIntyre, Attorney General, for the State.

Livingston & Green for respondent.

NORTON, J.—This cause is before us on the appeal of the State from the action of the circuit court of Howell county, in sustaining a motion to quash the second count of an indictment charging defendants with feloniously assaulting and inflicting great bodily harm on John Key. Among other grounds contained in the motion to quash, it is alleged that the indictment is vague, illegible, uncertain and unintelligible, and that the second count fails to state any offense. It is contended on the part of the State that the motion to quash should have been disregarded by the trial court because it did not distinctly specify the grounds of objection to the indictment. If the said motion had only stated as a reason for quashing the indictment, that it did not charge any offense, the point raised by counsel would be before us for determination, but inasmuch as it is also alleged as one of the grounds for the motion, that the indictment is vague, illegible, uncertain and unintelligible, it is unnecessary to consider the point presented, as that allegation was sufficiently specific to make it the duty of the court to pass upon the motion; and the only matter remaining to be determined by us is, whether the court erred in sustaining the motion and adjudging the second count to be insufficient.

We are of the opinion that the court erred in its action in this respect. The second count of the indictment, though inartificially drawn, alleges substantially that at the county of Howell, James Johns feloniously one John Key with large stones, and did

1. CRIMINAL LAW:
assault: indictment.

beat, wound and inflict great bodily harm on him the said Key, and that the other defendants, naming them, were present aiding, assisting and maintaining him in said assaulting and wounding. The above is the substance of the charge, and while the indictment contains some useless verbiage, it sufficiently notified defendants of the offense charged, and is not open to the objection specified in the motion that it is vague, uncertain, illegible and unintelligible.

In regard to the point made by the attorney general, that the motion to quash the second count of the indictment —: demurrer ment on the ground "that it does not state any offense," should have been disregarded, because it did not come up to the requirements of section 1818, Revised Statutes 1879, which declares that unless a motion to quash or demurrer distinctly specifies the grounds of the objection, it shall be disregarded, it may be observed that we are aware that in construing this section it has been held in the cases of *State v. Houten*, 37 Mo. 357; *State v. Berry*, 62 Mo. 595; *State v. Poston*, 63 Mo. 521, that in criminal cases a motion to quash or demurrer to an indictment, which only alleges that the indictment did not set forth any offense, should be disregarded. While said section 1818 has been thus construed, under section 3516, Revised Statutes 1879, a like section in practice in civil proceedings, which provides that a demurrer shall distinctly specify the grounds of objection to the pleadings, and unless it does so it may be disregarded, it has been held in the following cases that a demurrer which only alleges that the petition did not state a cause of action is sufficiently specific to be considered. *Morgan v. Bouse*, 53 Mo. 219; *Bank of the State v. Young's Admr.*, 35 Mo. 371; *Jordan v. R. R. Co.*, 61 Mo. 52. We can perceive no reason why the section relating to practice in criminal proceedings should receive a different construction from a like section in civil proceedings, and if a demurrer in a civil case which states as the ground of it, that the petition does not set forth a

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cause of action is sufficiently specific to be considered, we are of the opinion that in a criminal case a demurrer to the indictment which specifies as a ground of objection that it does not state any offense, is likewise sufficient, and in order that the rulings of this court may be harmonious as well as right, the cases of *State v. Houten, supra*; *State v. Berry, supra*, and *State v. Poston, supra*, are overruled, in so far as they declare that a demurrer to an indictment, which only states as the ground of objection that it does not set forth any offense, must be disregarded.

Judgment reversed and cause remanded for the reason that in our opinion the indictment sufficiently alleges an offense. All concur, except Judge SHERWOOD.

SMITH, *Appellant*, v. FINN.

Foreclosure of Mortgage. An action under the statute for the foreclosure of a mortgage, is one at law and not in equity. Hence, where the case is tried by the court without a jury and no declarations of law are asked or given, if there is evidence to support the judgment below, there is nothing for this court to review.

Appeal from Vernon Circuit Court.—HON. J. D. PARKINSON, Judge.

AFFIRMED.

E. E. Kimball and *E. J. Smith* for appellant.

Scott & Stone, Thos. Van Swearingen, A. W. Van Swearingen and *M. A. Pinkerton* for respondent.

HOUGH, C. J.—This is an action under the statute for the foreclosure of a mortgage. The case was tried by the court without the aid of a jury. No instructions were asked by the parties and none were given by the court.

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The court rendered final judgment for the defendants and also dismissed the petition of the plaintiff, acting upon the erroneous theory, we presume, that the suit before him was one in equity. The testimony, though conflicting, supports the judgment of the circuit court in favor of the defendants, and there being no declarations of law, there is nothing for us to review. The judgment of the circuit court will, therefore, be affirmed. The other judges concur.

HUTCHINS V. ROUNDTREE, *Appellant*.

- 1- **Covenant of Warranty: DAMAGES RECOVERABLE UPON BREACH.** The general rule is that for a breach of covenant of seizin and warranty, the measure of damages is the purchase money with interest. But where the covenantee has had possession and use of the premises he can recover no interest for any period prior to his eviction without proof that he has responded to his evictor for mesne profits, and then only for such period as he shall have so responded, which, under our statute of ejectment, (R. S. 1879, § 2252,) can in no case be longer than five years.
2. ———: **COSTS.** There is no question of the right of a covenantee evicted by law to recover the costs of the suit if he gave notice of its pendency to the grantor or his legal representative.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.

REVERSED.

Foster P. Wright for appellant.

Where plaintiff in an action of covenant of seizin has had the use of the premises, and ceased to be accountable for the use, the rule of damages is the purchase money without interest. *Flint v. Steadman*, 36 Vt. 210; *Collier v. Gamble*, 10 Mo. 468; *Dickson v. Desire*, 23 Mo. 163; *Pres-*

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cott v. Trueman, 4 Mass. 627; *Wyman v. Ballard*, 12 Mass. 304; *Staats v. Ten Eyck*, 3 Cai. 111.

F. S. Heffernan for respondent.

The measure of damages is the purchase money and six per cent interest. *Hall v. Bray*, 51 Mo. 288. The rule which limits the recovery in an action upon the covenant of seizin, to a nominal sum, until there has been an actual eviction, does not apply when the title conveyed has entirely failed, and the grantee holds an adverse title. *Lawless v. Collier*, 19 Mo. 481; *Alexander v. Schreiber*, 10 Mo. 460; *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; *Abbott v. Allen*, 14 Johns. 248; *Chapman v. Holmes*, 5 Halst. 20; *Stewart v. Drake*, 4 Halst. 139; *Murphy v. Price*, 48 Mo. 247; 4 Kent's Com., 477; *Dickson v. Desire*, 23 Mo. 151; *Frazier v. Supervisors of Peoria*, 74 Ill. 282; *Collins v. Thayer*, 74 Ill. 138. The general rule is the consideration paid with interest. *Hartford, etc., Co. v. Miller*, 41 Conn. 112; *Illinois v. Anderson*, 73 Ill. 439; *Herndon v. Harrison*, 34 Miss. 486; *Blossom v. Knox*, 3 Chandl. (Wis.) 295; *Wheiting v. Nissley*, 13 Pa. St. 650; *Nutting v. Herbert*, 37 N. H. 346; 35 N. H. 120. And it seems the measure there is the same for breach of the covenants of warranty of enjoyment. *Foster v. Thompson*, 41 N. H. 373; *Wilson v. Wilson*, 5 Fost. (N. H.) 229. In Massachusetts the question was discussed at length in an action on the covenant of seizin and good right to convey. It was held the general rule is the consideration paid with interest from date of the deed. *Smith v. Strong*, 14 Pick. 128.

PHILIPS, C.—This case originated in the probate and common pleas court of Greene county, upon a demand for allowance in favor of respondent against the estate of Thos. Roundtree, deceased, upon a breach of covenant of warranty to forty acres of land conveyed by decedent to respondent in April, 1865. The demand was presented

and tried at the April term, 1879, on the following agreed statement of facts:

"It is admitted for the purposes of this trial, that Z. M. Roundtree is the administrator of the estate of Thomas Roundtree, deceased, for the breach of whose covenant this action is had; that the deed of decedent to plaintiff was made and delivered to plaintiff on the 13th day of April, 1865; that the forty acres of land for the loss of which this suit is pending, cost, at the date of said deed, \$433.20; that plaintiff took possession of said forty acres under and by virtue of said deed, and held the possession of the same to his own use, till about two months ago, when the eviction complained of took place; that there was at the date of said deed of said Roundtree, deceased, to plaintiff, outstanding paramount title to said forty acres, by reason of which such eviction took place as above stated; that plaintiff spoke to defendant Z. M. Roundtree, as administrator of Thomas Roundtree, deceased, about the suit in ejectment as soon as it was brought, in which the eviction took place afterward, but the defendant Roundtree declined to have anything to do with the defense of said suit of ejectment; that plaintiff made an arrangement with the guardian (one J. L. McCracken) of the minor heirs of said deceased, by which said guardian agreed to assist and did assist plaintiff in the defense of said ejectment; that said Thomas Roundtree died about the 1st day of January, 1870, and that said Z. M. Roundtree, the defendant, took letters on the estate of said Thomas Roundtree, deceased, on the 10th day of January, 1870; and gave notice of the grant of said letters to him as such administrator within thirty days after the date thereof; and is still proceeding with the administration of said estate for the purposes of said claim, though he has distributed a large portion of the estate under the order of the probate court to the heirs of said deceased."

The above was all the evidence in the case in the probate court. The court, at the instance of the plaintiff,

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gave the following declaration of law, to-wit: "That the plaintiff is entitled to a judgment for the amount originally paid for the land, and six per cent interest from the date of the purchase until now;" to the giving of which the defendant at the time objected and excepted.

The court then refused the following declarations of law asked by defendant, to-wit:

1. That in warranties of seizin, if at the time the warranty is made there is outstanding paramount title, a breach exists from the date of delivery of the deed, the damages, however, being only nominal, if there is seizin in the covenantee, but if no seizin follow, the damages are real and is the purchase money and interest.

2. That when seizin follows the warranty, until the eviction takes place there is nothing but nominal damages, and inasmuch as the purchaser may quiet his title by buying in the outstanding title at its reasonable value, the value of the land at the time of the eviction or purchase of outstanding title would be the criterion of damages.

3. That inasmuch as Thomas Roundtree, the warrantor, was dead at the time of the eviction in this case, and the cause of action did not exist at his death, the remedy is against his legal and not his personal representatives.

4. That the testimony showing that the administrator refused to have anything to do with the defense of Norfleet and others against Hutchins, he is not responsible for the costs.

These declarations of law were refused, and the defendant excepted. The court then rendered a judgment of allowance against the estate for \$840.95; \$433.20 of which was for the purchase money; \$364.95 for interest on the same from said 13th of April, 1865, to May 30th, 1879, and \$42.80 for costs alleged to have accrued in the ejectment suit in which the title to the forty acres was tried. Defendant filed a motion for a new trial which was overruled, and defendant excepted, and took the case to the

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circuit court of Greene county by appeal. At the next Greene circuit court, and on the 13th day of June, 1879, the case came on to be heard, in that court, both parties appearing by their respective counsel. The judgment entry in the circuit court is: "And the court, after hearing the argument of counsel, and an examination of the errors assigned by the appellant, and fully considering the same, doth order, adjudge and decree, that the judgment of the probate and common pleas court be and the same is hereby affirmed, with direction that the clerk of this court certify the same back to the probate and common pleas court of Greene county, for further action of said court." There was no trial *de novo*, nor did the court hear any evidence. After an ineffectual motion for new trial, the administrator appealed to the Supreme Court.

It is unimportant to determine the preliminary questions raised by the appellant as to the statute under which the proceeding in the probate court should have been conducted, or as to the regularity of the action of the circuit court in not trying the case *de novo*. The whole issue is in the agreed statement of facts and the law arising thereon. The interests of justice will best be subserved in deciding the case on its merits.

The real question presented for determination is as to the measure of damages. The rule is generally stated that

1. COVENANT OF WARRANTY: damages recoverable upon breach.

for a breach of covenant of seizin and warranty the covenantee is entitled to recover from the covenantor the original purchase money with interest. But is this arbitrarily so, to be applied universally to every case? The primary object in establishing this measure of compensation is to place the parties as nearly as may be in the situation they occupied at the time of the execution of the contract. The restitution of the purchase money, therefore, naturally occurs. And as the vendor has had the use of the money, the interest is exacted for this use, upon the ground that this is the vendee's actual loss. Sedgwick on Dam., (176) 347.

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But this is simply the measure—the maximum, and not the minimum, of damages. If the loss in fact is less than the consideration, the grantee can only recover the actual loss. Sedgwick on Dam., *supra*, and p. 348 (7 Ed.) Where, after eviction, the grantee buys in the paramount title, he can only recover from his covenantor the sum paid for the superior title, provided it be less than the original purchase money and interest. *McGary v. Hastings*, 39 Cal. 360; *s. c.*, 2 Am. Rep. 456. Between vendor and vendee the conceded rule is to regard the interest the equivalent of the use of the land and, *e converso*, the use of the land the equivalent of the use—the interest—of the purchase money. *Frazier v. Supervisors of Peoria*, 74 Ill. 282; *Collins v. Thayer*, 74 Ill. 138; *Lawless v. Collier*, 19 Mo. 485. On principle then, why should a grantee who has entered under the deed, used and enjoyed the land, as in the case at bar, for fourteen years uninterruptedly, recover from his grantor interest during that period? The grantor has had the use of the money, and the grantee the land; the interest of the one is in law, without other proof, deemed the equivalent of the rental of the other. In *Spring v. Chase*, 22 Me. 510, the court hold this to be a presumption of law, and, therefore, conclusive. And this is supported by other authorities. *Rich v. Johnson*, 2 Pin. (Wis.) 88.

The reason of the rule for allowing both the purchase money and interest as the measure of damages is "because the party takes nothing by his deed;" being in its inception and continuation a nullity. But if in fact the grantee takes something, as the possession, and enjoys it, the reason of the rule ceases, so far as the interest is concerned. *Hartford & S. O. Co. v. Miller*, 41 Conn. 130. And this accords not only to the philosophy of the principle of compensation, but to the letter of the usual covenants of the deed for seizin and further assurance. In case of eviction the grantee loses the estate and is entitled to have back the consideration paid; but as he obtained and enjoyed the

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possession, the covenant of seizin was in part performed, equal to the interest on the purchase money.

The controlling reason assigned for permitting the covenantee to recover interest, notwithstanding his use of the premises, is that he is answerable to the true owner in case of eviction for the mesne profits. It must result, therefore, inevitably from this premise, that where the mesne profits are not recoverable no interest is recoverable, where the vendee has held possession. There should not be both usance and use in the grantee.

Section 13, chapter 151, General Statutes 1865, provides that "If the plaintiff prevail in the action, he shall recover damages for all waste and injury, and, by way of damages, the rents and profits, down to the time of assessing the same, or to the time of the expiration of the plaintiff's title, under the following limitations: 1st, When it shall not be shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action, such recovery shall be only from the time of the commencement of the action; 2nd, When it shall be shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action, and that such knowledge came to the defendant within five years next preceding the commencement of the action, such recovery shall be from the time that such knowledge came to the defendant; 3rd, When it shall be shown on the trial that knowledge of the plaintiff's claim came to the defendant more than five years prior to the commencement of the action, such recovery shall only be for the term of five years next preceding the commencement of the action." R. S. 1879, § 2252.

Under this statute, the ejector holding the paramount title could in no event recover rentals for a longer time than "five years next preceding the commencement of the action." Between that and the time of commencing the action, he can recover no rents prior to the knowledge of his claim coming to the tenant. So that in case of breach

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of covenant and eviction in such case, no interest can be allowed on the purchase money for a period exceeding five years; and as anterior to the institution of the suit the plaintiff would not be entitled to rents and profits without proof made that the tenant had knowledge of the claim, there would be no presumption in law, in the event of eviction, that he had recovered any rents, etc., back of the day of bringing suit. And, therefore, in action on covenant for the breach against his grantor, by merely making proof that on a day given, he was evicted, he would not show a right to recover interest in a case where under his deed he had held and used the premises to the day of eviction.

The agreed statement of facts in this case recites "that plaintiff took possession of said forty acres under and by virtue of said deed and held possession of the same to his own use till about two months ago, when the eviction complained of took place." So it is conceded that up to the ejectment the respondent had the use. There is no evidence of any recovery of mesne profits, nor of any knowledge on the respondent's part prior "to the commencement of the action," of the outstanding claim. Why, then, should the covenantee, in such case recover interest for a period of fourteen years, as he did in this case, or for any period, prior to the eviction? While there has been no direct adjudication of this question by the Supreme Court of this State, yet in *Lawless v. Collier*, 19 Mo. 485, 486, Scott, J., with his characteristic strong sense of justice, asserts as correct the principle of this opinion. Leonard, J., in *Dickson v. Desire*, 23 Mo. 167, asserts that whether the grantee "be entitled to interest on the purchase money depends upon circumstances;" and he refers to *Lawless v. Collier* as authority. In *Flint v. Steadman*, 36 Vt. 211, it is held that where the covenantee "had the use of the premises, and held them in a manner to be relieved from accountability for their use, the rule of damages will be the purchase money without interest." This accords with a

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sense of right; and entertaining these views, under the facts of this case, I hold that the probate and circuit courts erred in charging the estate of the decedent with any interest prior to the eviction.

The courts below also allowed the sum of \$42.80 for costs accrued in the ejectment suit. There is no question 2. — : costs. of the right of an evicted grantee to recover such costs where he gave notice to the grantor or his legal representative of the pendency of the ejectment suit. This notice seems to have been given in this case; but there was no evidence in the agreed statement of facts as to the amount of such costs, or that any costs were paid by the plaintiff, in this action. So this part of the judgment was without evidence to support it.

The judgment of the probate court and the circuit court were, therefore, erroneous, and the same are reversed and the cause is remanded to the circuit court, with directions to certify the case back to the said probate court of Greene county, with directions to proceed to enter up judgment in accordance with this opinion. All the commissioners concur.

PRICE V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Master and Servant: DAMAGES.** Where a servant accepts employment knowing, as well as his employer, its perils, or continues in service after he acquires such knowledge, he has no claim for damages against the employer for an injury occasioned by such perils.
2. **Instructions.** It is error to give instructions which are contradictory, or are not warranted by any evidence in the case.

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Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

REVERSED.

Geo. W. Easley for appellant.

W. D. Carlisle and *A. J. Blethen* for respondent.

HENRY, J.—This action is for the recovery of damages for the death of plaintiff's husband caused by injuries received by him, at defendant's round-house in the City of Kansas, on the 24th day of January, 1879. The deceased was employed by defendant as a fireman upon its locomotive engines. Plaintiff had judgment for \$5,000, from which defendant has appealed.

It was stipulated that the following facts should be taken as admitted by both parties: That the engine-house was not lighted on the night of the injury to Price, in any other manner than by the small hand-lamps carried by a portion of the employes; that the deceased, and the person who backed the engine into the stall, were both well aware of the fact that the engine-house was not lighted; and both the deceased and the said person handling the engine had known that said engine-house had not been lighted from the time it was built, up to the time of the accident; that the deceased lay down between stalls two and three in said engine-house, from a half an hour to an hour before the injury, and fell asleep; and in his sleep, a short time before the injury, turned over so that his foot lay on the rail of the track of the stall, and that the engine was backed over or against his foot by one of defendant's agents or servants, so that his foot was injured to such an extent that amputation became necessary, from which amputation he died; that plaintiff was the widow of the deceased, R. B. Price, and still is such widow.

The testimony for plaintiff proved that the railroad

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tracks in a round-house are used for putting engines on and are called "stalls;" that the space between them is eight or ten feet wide, and there are no walls or fences between the stalls. The round-house was built in August or September, 1878, and the deceased and other employes of defendant, with the knowledge and consent of the company, had been sleeping in the round-house in the space between the stalls, the most of the time after its erection, until the death of the deceased. He was seen asleep on the night in question, within two or three feet of the track. A short time before the engine which passed over his leg went into the round-house, no part of his body was on the track. There were no lights in the house at the time except small tin hand-lamps or torches carried about by the men in their hands. There were no stationary lights. The fireman who ran the engine in knew that men were sleeping between the stalls. Requisition had been made by the foreman of the engine-house for lights for this house on the 9th day of September, 1878, but they were not furnished until after Price was killed. The bell on the locomotive was rung as usual that night when it started to the round-house, about sixty yards from the round-house. This was the only and usual signal. The employes were permitted and encouraged by the foreman of the engine-house to sleep in the round-house.

These were substantially the facts established by the evidence, and the court refused an instruction asked by I. MASTER AND
SERVANT: damages. defendant, that on these facts, plaintiff was not entitled to recover. The deceased and the fireman, who ran the engine into the round-house, were fellow servants, and if his death was occasioned by the negligence of the fireman, plaintiff was not entitled to a verdict.

If it be conceded that the defendant owed a duty to its employes to provide the round-house with lights, and that the death of Price is to be attributed to the neglect of that duty, yet Price was aware that it had been neg-

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lected ever since the erection of the house, four or five months before he was injured. He was aware that on that night there were no lights in the house, and he had every reason to know that there would be none. He had slept there most of the time after the house was built until the night in question. He was aware of the danger to which he exposed himself by sleeping in such a place. It was not only carelessness, but such carelessness as amounted to recklessness on his part to voluntarily place himself in such danger. It is no answer to this to say that he was encouraged to sleep there by defendant, or that the service he was engaged in required it, because, even if that be so, he continued in that service, and repeatedly, almost continuously, placed himself in that peril, knowing as well as the company, its nature and extent. In such case the servant assumes the risk. *Keegan v. Kavanaugh*, 62 Mo. 232; *Porter v. Hann. & St. Jo. R. R. Co.*, 71 Mo. 67.

The evidence on the part of plaintiff—none was introduced by defendant—discloses such a clear case of contributory negligence on the part of the deceased, as precludes a recovery by plaintiff. There was no evidence that the company required defendant or any of its employes to sleep in the round-house. All that the evidence tends to prove on that subject is, that knowing that they were in the habit of doing so it was permitted, and in some instances, encouraged; but in either aspect of the case, a servant who takes employment knowing as well as the employer the risk, or continues in that service after he acquires that knowledge, has no claim for damages against the employer for an injury he may sustain resulting from the risk he has taken. If by the terms of the employment a servant were required to sleep in that round-house between the stalls, and he was fully aware of the danger to which it would expose him, he has his option to enter or decline the service, but, accepting it, he assumes all such risks as are equally as well known to him as to his employer. "If the risk is such as to be perfectly obvious to the sense of any

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man, whether servant or master, then the servant assumes the risk." *Keegan v. Kavanaugh, supra.*

The court in the second, third, fourth and fifth instructions given at defendant's instance, properly declared that
2. INSTRUCTIONS. if the deceased was injured in consequence of the negligence of the servants of defendant engaged in putting the engine into the round-house, plaintiff could not recover, but in the first given for plaintiff, told the jury that if his injury was occasioned by the negligence or unskillfulness of defendant, its agents or servants, while running one of its locomotives, and that Price at the time exercised ordinary care and prudence, plaintiff should recover. This was in direct conflict with those given for defendant.

In the plaintiff's second instruction the jury were told that although Price's own negligence contributed directly to his injury, that would not preclude plaintiff's recovery, if defendant could have avoided the injury to him, after notice that he was lying partly on the track. There was not a scintilla of evidence of any such notice, and it was, therefore, error to give the instruction.

All concurring, the judgment is reversed.

LA RIVIERE V. LA RIVIERE *et al.*, Appellants.

1. **Identity of Name** is competent evidence of identity of person.
2. **Indian Marriages.** The principles announced in *Johnson v. Johnson's Admr.*, 30 Mo. 72, and *Boyer v. Dively, Admr.*, 58 Mo. 510, in regard to the marriages of white persons with Indians, approved.
3. **Ejectment: TENANTS IN COMMON: PLEADING: OUSTER.** In an action of ejectment by one tenant in common against another, the ouster is admitted by a general denial, but the admission does not extend to the date of the ouster as alleged in the petition.
4. **Practice: AMENDMENT OF JUDGMENT.** Pending a motion in arrest, it is not error to permit a dismissal as to a married woman and a

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corresponding amendment of a judgment which has been rendered against such woman and other defendants.

Appeal from St. Louis Court of Appeals.

REVERSED.

This was an action of ejectment, commenced December 14th, 1875. The ouster was alleged in the petition to have occurred May 2nd, 1872. The answer was the statutory general denial. It was conceded that the title to the land in dispute had been in Mary La Riviere, who died intestate leaving, as her surviving children, John La Riviere, Mary, wife of William Johnson, Genevieve, widow of William H. Munsa, Theresa, wife of Michael Badeau, and Antoine La Riviere. Plaintiffs claimed to be the children of Antoine by a marriage with an Indian woman. The identity of the Antoine La Riviere, the son of Mary, with the Antoine who intermarried with the Indian woman, the validity of this marriage, and the legitimacy of the plaintiffs as their children, were the questions at issue upon the trial.

The instructions given on behalf of plaintiffs, were as follows:

1. If the jury find for plaintiffs they will find that they are entitled to the possession of an undivided fifth part of the property described in plaintiffs' petition, and they will further assess their damages for the detention of said property from them at one-fifth of the value of the rentals of said property from the 2nd day of May, 1872, to the present time.

2. If the jury believe from the evidence that Antoine La Riviere was married to the mother of plaintiffs, in the Indian country, according to the Indian customs, and that from the time of his said marriage with the mother of plaintiffs, he held her out to the world as his wife, and lived with her as such; that both before and after the death of their mother, he treated plaintiffs as his lawful children,

then his marriage was a valid marriage, and the jury must find for plaintiffs, provided they also find that the Antoine La Riviere through whom they claim is their father, and identically the same Antoine La Riviere formerly of St. Louis, and child of Pierre La Riviere and Mary, his wife.

3. Identity of name is evidence tending to show identity of person, until some other person is pointed out, to whom the name might have been applied.

4. If the jury believe from the evidence that the plaintiffs are the children of Antoine La Riviere and of the woman with whom he cohabited in the Indian country, and that the said Antoine La Riviere and the said woman are both dead, they are instructed that the legitimacy of plaintiffs being called in question, they should give every reasonable presumption in favor of their legitimacy not necessarily excluded by the evidence.

5. Cohabitation as husband and wife, between a man and a woman, is presumed to be lawful until shown to be otherwise.

6. If the jury believe from the evidence that Antoine La Riviere was married in the Indian country according to Indian customs, his marriage is a valid marriage, although by such Indian customs, it was dissoluble at the will of either party during their lifetime.

The instructions given for defendants, were as follows:

1. The declarations of Antoine La Riviere as to his relatives in St. Louis or to the defendants, are to be disregarded in the consideration of a verdict, and are not to be weighed unless the jury believe them to have been made by the very same Antoine who was a brother of defendants.

2. For plaintiffs to recover, three things must have been by the evidence established: 1st, That the Antoine La Riviere, through whom they claim, is identically the same Antoine La Riviere formerly of the city of St. Louis and child of Pierre La Riviere and of Mary, his wife, before her marriage Mary Labadie; 2nd, That plaintiffs are

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his children; 3d, That they are children of a marriage, and not the fruits of an illicit intercourse had with their mother by said Antoine La Riviere. If any one of these three facts have not been by the evidence established, the jury must find for the defendants.

3. Though the jury must believe from the evidence that Antoine La Riviere lived and cohabited with the mother of plaintiffs, had by her children, the plaintiffs, treated her with kindness and affection, spoke of her in terms of endearment and even introduced her as his wife, this is not conclusive evidence that there was in fact a marriage between them, and if the jury believe in fact that they were not married, the jury must so find.

4. If the jury believe from the evidence that at the commencement of the intercourse between plaintiffs' mother and Antoine, their intercourse was illicit, then the law presumes such illicit intercourse to have continued, and there must be evidence to show that its character was subsequently changed, and the burthen of making the proof of such change devolves upon the plaintiffs.

Defendants asked for the following instructions, which were refused:

5. Evidence that Antoine La Riviere and the mother of plaintiffs were married according to the Ponca fashion, is no evidence of the legitimacy of the marriage, there being no proof that they were married in the Ponca nation, or on the Ponca reserve, and the jury must, therefore, find for defendants.

6. If the jury believe from the evidence that plaintiffs claim through a supposed marriage of their parents, according to the form in vogue among the Ponca Indians, and when both parents were residents of the Ponca nation or tribe, and that in fact no marriage exists among the Ponca Indians, and in lieu thereof there exists an agreement between parties to cohabit with each other as long as both are consenting, and with right of either, at any time, of mere caprice, and without formality, to abandon the

relation with each other, whereupon it becomes a perfect nullity, obligatory on neither, then such cohabitation with each other is no presumption of a marriage in law, and the jury will find accordingly.

7. Although the jury find from the evidence that said Antoine and plaintiffs' mother cohabited together as man and wife, and plaintiffs are the fruits of their sexual intercourse with each other; that Antoine and plaintiffs' mother treated plaintiffs as their legitimate children, and treated each other as husband and wife, introducing each other as such to other persons, still, if the jury further find from the evidence that such cohabitation commenced and was continued always without any marriage between said Antoine and plaintiffs' mother, then the presumption of a marriage between them because of their cohabitation with and treatment of each other is destroyed, and the contrary presumption arises, that such continued cohabitation and treatment of each other was without the sanction of marriage, and they will find against the existence of the marriage, unless the jury believe that such a marriage has been proven by other evidence than the cohabitation of the parties and their treatment of each other and of the children.

8. If the jury believe from the evidence that Antoine La Riviere, through whom plaintiffs claim as heirs, was really their father, that prior to the birth of any of the plaintiffs he lived with their mother in a state of adultery or concubinage, then if they lived together afterward, the law presumes that they so continued to live in adultery or concubinage, and it devolves upon the plaintiffs to prove to the satisfaction of the jury, that they were subsequently lawfully married, and in the absence of such proof, they must find that said Antoine and the mother of plaintiffs were not married.

Alex. J. P. Garesche and Charles A. Winslow for appellants.

I. D. Foulon for respondents.

SHERWOOD, J.—Ejectment by tenants in common against their co-tenants for one-fifth of certain premises situate in the city of St. Louis. The plaintiffs claim as heirs of their father, Antoine La Riviere, their mother being a three-quarter blood Ponca Indian woman. The contention in the trial court by the defendants, was on two points: 1st, That the father of plaintiffs was not the Antoine La Riviere who was the son of Mary La Riviere, deceased. 2nd, That even if he were the same person, plaintiffs could not recover by reason of the invalidity of his marriage with the mother of plaintiffs.

I.

The question of the identity of the father of plaintiffs with the Antoine La Riviere who was the son of Mary La Riviere, was submitted to the jury under unexceptionable instructions, and upon sufficient evidence, and their verdict on the point is consequently conclusive.

II.

The same may be said touching the question of the validity of the marriage of plaintiffs' father. The principles announced by this court respecting the marriage of whites with Indians, in the cases of *Johnson v. Johnson's Admr.*, 30 Mo. 72, and *Boyer v. Dively, Admr.*, 58 Mo. 510, were fully and correctly applied to the facts of the case at bar, by the instructions given, and no more need be said.

III.

The defendants, by controverting the title of plaintiffs, thereby admitted the ouster, and superseded necessity of proof thereof. *Peterson v. Laik*, 24 Mo. 541; *Sedgwick & Wait Trial of Title to Land*, § 209; *Miller v. Myers*, 46 Cal. 535; *Greer v. Tripp*, 56 Cal. 209; *Harrison v. Taylor*, 33 Mo. 211. The answer of defendants, being a general one,

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must then under the authorities be regarded as an implied admission of the ouster; for it is not permissible for a co-tenant in an ejectment suit to have the benefit of disputing the title of his co-tenant, the plaintiff, and still at the same time have the benefit of denying the ouster. He cannot have such cumulative advantages; he cannot in one breath deny the co-tenancy and claim the benefit of the relation. And, as a matter of course, if the answer of the defendants in the present case is to be regarded as an admission of the ouster, it is an admission of the ouster as laid in the petition of plaintiffs, so that there was nothing improper in the trial court taking the date of that ouster as the correct one in instructing the jury.

IV.

We find no fault with the trial court in permitting the plaintiffs, pending the motion in arrest, to dismiss as to defendants Mary Johnson and Theresa Badeau, and in permitting the judgment to be amended accordingly. *Jackson v. Bowles*, 67 Mo. 609; R. S. 1879, § 3570; *Blaisdell v. Steamboat Wm. Pope*, 19 Mo. 157; *Blumenthal v. Kurth*, 22 Mo. 173; *Webster v. Blount*, 39 Mo. 500.

For these reasons we affirm the judgment.

On Motion for Rehearing.

SHERWOOD, J.—Upon more mature consideration and a re-examination of the authorities, we are satisfied that the implied admission of the ouster did not admit also the date thereof alleged in the petition. Therefore judgment reversed and cause remanded.

THE STATE V. RUSH, *Appellant*.

Witness, Impeachment of. An impeaching witness cannot be asked whether he would believe the former witness on oath; and it is specially objectionable to ask him whether from his own knowledge of the former witness he would believe him on oath. The inquiry should be as to his general reputation for truth and veracity in the community in which he lives.

Appeal from Washington Circuit Court.—HON. L. F. DINNING, Judge.

AFFIRMED.

Geo. D. Reynolds for appellant.

D. H. McIntyre, Attorney General, for the State.

HOUGH, C. J.—The defendant was indicted under section 35, page 504, 1 Wagner's Statutes, for selling fermented and distilled liquors on Sunday. He was found guilty and sentenced to pay a fine of \$5.

No brief has been filed on behalf of the defendant.

The indictment is in proper form, and the testimony supports the verdict.

One of the witnesses introduced for the purpose of impeaching the character of Jasper Perryman, the prosecuting witness, was asked the following question: "From your knowledge of Jasper Perryman, and your knowledge of his character for truth and veracity in the neighborhood in which he lived, would you believe him on oath?" The refusal of the court to permit the witness to answer this question was excepted to by the defendant, and made one of the grounds for his motion for a new trial. The court properly refused to permit the witness to answer the question. Whether the witness Perryman was worthy of being believed on oath, was a question for the jury to determine from the testimony before them as to his general reputation for truth and veracity in the community in which he

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lived, and not a matter upon which the impeaching witness could properly express his own opinion. Wharton's Crim. Ev., (8 Ed.) § 58; Taylor's Ev., § 350. Even if the opinion of the impeaching witness were competent evidence, the question propounded would have been inadmissible for the reason that the witness was asked for an opinion based upon his personal knowledge of Perryman, as well as upon knowledge of his general character.

There is no error in the instructions of which defendant can complain. The court erroneously restricted the jury to sales by the defendant in quantities less than one gallon, and declared the maximum fine to be \$40; but these errors were favorable to the defendant.

The judgment of the circuit court will be affirmed. The other judges concur.

THOMPSON V. THE UNION ELEVATOR COMPANY, *Appellant*.

Costs, upon Compromise of Suit. After the institution of a suit the parties compromised and the plaintiff executed a release to defendant of the cause of action sued for, and authorized a dismissal of the suit. No provision was made as to costs. *Held*, that the release operated to bar any right on the part of the plaintiff to recover of defendant the costs already accrued, except such as had been adjudged against him.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

REVERSED.

The release was as follows:

"Know all men by these presents, that I, Charles Thompson, in consideration of the sum of \$250 to me in hand paid by the Union Elevator Company, do hereby release and forever discharge the said elevator company, its

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successors and assigns, of and from all actions, causes of action, controversies, claims, damages and demands whatsoever for or by reason of an injury received by me by falling from the scaffolding in the elevator of said company at Kansas City aforesaid, on the 29th day of November, 1875, and to recover damages for which an action is now pending in the circuit court of Jackson county, Missouri, at Kansas City, brought by me as plaintiff against said elevator company as defendant; and I hereby authorize the dismissal of said suit."

Pratt, Brumback & Ferry for appellant.

Amos H. Kagy for respondent.

HENRY, J.—The only question involved in this case is whether the lower court erred in rendering a judgment against the defendant for costs. It is a suit by plaintiff against defendant for damages for a personal injury. The answer of the defendant contained a denial of all the allegations of the petition, and a plea of release. There was a mistrial at the October term, 1878, of the Jackson circuit court, and on the 11th day of November, following, plaintiff executed a release to the defendant of all claim for damages for said injury, and on the 13th day of November, the defendant filed an amended answer, pleading said release in bar of the further prosecution of the suit. The plaintiff replied, denying the execution of the release, and on a trial the issue was found against him, and the court rendered a general judgment against him, but adjudged the costs which had accrued in the cause, at the date of the filing of the amended answer, against defendant, and from this judgment defendant appeals.

At common law, plaintiff was in no case entitled to recover costs. *Steel v. Wear*, 54 Mo. 532. In this State the matter of costs is regulated by statute, which is to be strictly construed. *Shea v. K. C., St. Jo. & C. B. R. R. Co.*, 67 Mo. 687; *Gordon v. Maupin*, 10 Mo. 352. Section 990,

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Revised Statutes 1879, provides that "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." This has reference to the final determination of the cause, and to costs not then previously taxed. In *Hart v. Fitzgerald*, 2 Mass. 509, the court held, under a statute similar to ours, that: "The party prevailing, in all cases within the jurisdiction of the court, is entitled to costs, and no distinction is made as to the form or manner in which he shall prevail." *Coffin v. Cottle*, 9 Pick. 287, is to the same effect.

The defendant in the case at bar was "the prevailing party," and in the adjudication of costs, it is of no consequence how or why he prevailed. The plaintiff executed a release after the suit was instituted, and instead of dismissing, persisted in prosecuting it. If he had voluntarily dismissed his suit, as he should have done, the court could not have adjudged the costs against the defendant, and does it make a difference in plaintiff's favor, that, of his own wrong, he persisted in prosecuting a suit which he should have dismissed? If a party would have the costs adjudged against his adversary, who prevails in the suit by reason of a compromise, under which the suit cannot be further prosecuted, he should so stipulate in his compromise agreement.

The case of *Nettles v. Sweazea*, 2 Mo. 100, was decided under a statute materially different from that now in force, and whether the statute of 1825 was properly construed in that case, might be questioned, but however that may be, the decision should not control in the construction of section 990, *supra*.

The judgment is reversed and the cause remanded, and the court below directed to enter a judgment against plaintiff for all costs, except those, if any, otherwise taxed prior to the date of the final judgment in the cause. All concur.

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SNIDER, *Appellant*, v. ADAMS EXPRESS COMPANY.

Trustee of an Express Trust: CONSIGNOR SUING AS SUCH. The plaintiff, having sold land as agent of the owner and received the purchase money, delivered the latter to an express company for transportation to the owner. It was lost in transit. *Held*, that the plaintiff could maintain an action for its recovery. He was the "trustee of an express trust," within the meaning of section 3463, Revised Statutes 1879.

Appeal from Cedar Circuit Court.—HON. J. D. PARKINSON,
Judge.

REVERSED.

This was a suit by Henry J. Snider to recover damages for failure to deliver money alleged to have been placed in the care of the express company for transportation. At the trial plaintiff gave evidence tending to show that, as agent for his brother Andrew Snider and his sister Louisa J. Snider and several other persons, he sold a tract of land and received the purchase money; that he divided this money according to the interest of each, put the share of each into an envelope by itself, marking the envelope with the name of the owner, and placed them all in a larger envelope; that he then deposited the latter with the express company with directions to deliver the same to said Andrew Snider, taking a receipt in the usual form and paying charges of transportation with money reserved out of the fund; that all the beneficiaries lived in the same town; that the package was duly delivered to said Andrew, but upon being opened the envelope containing the share of said Louisa was found to be missing. This was the money sued for. The court sustained a demurrer to this evidence, and plaintiff took a non-suit with leave to move to set the same aside. In due time this motion was made and overruled, and plaintiff brought this appeal.

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E. E. Kimball and E. J. Smith for appellant.

Plaintiff is the proper party to bring this suit. Defendant agreed with him to convey the money safely, and from him received the fee therefor. *Blanchard v. Page*, 8 Gray 281; *Hooper v. R. R. Co.*, 27 Wis. 81; s. c., 9 Am. Rep. 439; *Southern Express Co. v. Craft*, 49 Miss. 480; s. c. 19 Am. Rep. 4; *Grinnell v. Schmidt*, 2 Sandf. 706; *Robbins v. Deverill*, 20 Wis. 148; *Joseph v. Knox*, 3 Camp. 320; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Davis v. Harness*, 39 Ohio St. 332; s. c., 22 Am. L. Reg. 213. His right of action on the contract is not affected by the provision of the code which requires every action to be brought in the name of the real party in interest. The consignor is a party in interest to the contract, and it does not lie in the carrier, who made the contract with him, to say, on a breach of it, that he is not entitled to recover the damage, unless it be shown that the consignee objects, for without that it will be presumed that the action was commenced and prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor is by the operation of the rule regarded as a trustee of an express trust, like a factor or other mercantile agent, who contracts in his own name on behalf of his principal. *Denver, etc., R. R. Co. v. Frame*, (Supt. Ct. Colorado); 16 Cent. L. J. 337; s. c., 1 Denver L. J. 66.

The consignee, Andrew Snider, had and has no possible interest in the subject matter of this suit. He was not a party to the contract of carriage, and had he received the money sent to him, he would simply have been charged with the duty of delivering it to Louisa to whom it belonged, according to the instructions sent by plaintiff. On the other hand, Louisa never authorized the money to be sent in any way. Plaintiff assumed all risk of loss, and Louisa could maintain an action against him for the money. Therefore he is the real party in interest here. *Stewart v.*

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Frazier, 5 Ala. 114; *Kowing v. Manly*, 49 N. Y. 192; s. c., 10 Am. Rep. 346; *Jenkins v. Bacon*, 111 Mass. 373; s. c., 15 Am. Rep. 33.

Blair & Perry for respondent.

Plaintiff is not the trustee of an express trust. An express trust is created by an instrument that points out directly and expressly the property, persons and purposes of the trust. And as they are directly declared by the parties there can never be a controversy whether they exist or not. Such a trust cannot be proved by parol, and can only be created by writing. *Perry on Trusts*, (3 Ed.) §§ 24, 79, 82. Louisa J. Snider is the real party in interest, and the suit should have been brought in her name.

Williams v. Whitlock, 14 Mo. 553; *Hutchings v. Blackford*, 35 Mo. 285; *Weise v. Gerner*, 42 Mo. 527; *Wallhormfechtel v. Dobyns*, 32 Mo. 310; *State v. Anderson*, 5 Kas. 115; *Railroad Co. v. Wheaton*, 7 Kas. 232; *Coffman v. Parker*, 11 Kas. 12; *State v. Jefferson Co.*, 11 Kas. 66; *Humphreys v. Keith*, 11 Kas. 108; *Schnier v. Fay*, 12 Mo. 184; *Crowell v. Ward*, 16 Kas. 60. The person for whose use a contract for carriage is made is the proper one to sue for its breach, though it is not made with him. *Angell on Carriers*, §§ 495, 497, 506; *Hooper v. R. R. Co.*, 27 Wis. 81; *Magruder v. Gage*, 33 Md. 344; s. c., 3 Am. Rep. 177; *Krulder v. Ellison*, 47 N. Y. 37; s. c., 7 Am. Rep. 402; *Thompson v. Fargo*, 49 N. Y. 188; s. c., 10 Am. Rep. 342.

SHERWOOD, J.—The controlling question in this case is, whether the plaintiff is the proper party to sue, the answer denying that he is the proper party.

It is quite clear from the testimony, that the plaintiff was acting as the agent of his sister, Louisa J. Snider, in collecting and forwarding the money arising from the sale of her interest in the land. The contract with the defendant company, for the transmission of the money, for the loss of which suit is now brought, was made by plaintiff,

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in his own name, without mention of any one as beneficiary of such contract. If so, then it was competent for the agent, with whom the contract was actually made, to sue in his own name, or for his undisclosed principal, with whom in point of law the contract was made, to sue in her own name. *Cothay v. Fennell*, 10 B. & C. 671; *s. c.*, 21 E. C. L. 146; Story on Agency, §§ 160, 270, and cases cited; *Ferris v. Thaw*, 72 Mo. 446. In *Blanchard v. Page*, 8 Gray 281, the same view as that just announced is stated, and it is there held, after an extensive and elaborate review of the authorities, by Shaw, C. J., that a consignor was the proper party to sue, though having neither a general or special property in the goods.

But it is urged that under the code the action must be "prosecuted in the name of the real party in interest." R. S. 1879, § 3462. But there are exceptions to this rule, expressly made in the section quoted, and set forth in the section following. Among those exceptions is that of a trustee of an express trust, who may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. In the language of the section referred to, "A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It is claimed by counsel for defendant that there is no express trust in the case, because such trust must point out with precision the subject, the persons and the purposes of the trust; cannot be proved by parol, and can only be manifested or proved by some writing. Whatever of truth there may be in this position regarding trusts as to realty, it is not true regarding personal property; for such property is not within the terms of the statute, and such trusts, consequently, may be declared and proved by parol. The point has been so decided inferentially in England, and directly decided in this way in this country. 1 Perry on Trusts, § 86, and cases cited.

But we need not search the text books in the endeavor to maintain in the present instance that the plaintiff is the trustee of an express trust, since, under the terms of the statute, the circumstances of this case endow him with all the attributes pertaining to that character: (1) He is the person with whom, and in whose name, the contract now in suit was made. (2) He made the contract for the benefit of another, as shown by the evidence adduced.

It was held at an early day in this State, that a party to whom a note had been assigned merely for the purpose of collection, was the "real party in interest," within the meaning of the statute; that the assignment created in the assignee the legal interest and thereby he became the proper party to sue. *Webb v. Morgan*, 14 Mo. 429. This ruling was followed in the similar case of *Beattie v. Lett*, 28 Mo. 596, where the one just mentioned was approvingly cited and followed, and the remark made that the assignees had the right to maintain an action on the note in their own names, "because they were the trustees of an express trust, and had the legal title to the note." So, also, in *Simmons v. Belt*, 35 Mo. 461, in similar circumstances, the above case was cited with approbation; and in *Nicolay v. Fritschle*, 40 Mo. 67, where it was held that though the sum mentioned in the note was not due the plaintiff, yet that he being the payee mentioned therein; having possession of the notes and the legal title thereto, that he had such an interest as authorized him to sue; that if the notes were impressed with a trust in his hands, that trust could subsequently be asserted; that the fact that such a trust existed constituted no defense to the action, and that a judgment was properly rendered as if for want of an answer, where the answer set up the facts aforesaid.

Now, if a contract originally made in the name of another, by an assignment thereof, which confers no beneficial interest—which makes the party to whom made the mere naked depository of the legal title—can endow the assignee with rights as the real party in interest—can clothe

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him with the attributes of a trustee of an express trust—assuredly a party with whom, and in whose name the contract was originally made, for the benefit of another, should encounter no legal obstacle in maintaining an action in his own name on the contract thus made. And so the point has been ruled; as in the case where a written contract was made with an administrator of an estate, and upon his resignation as such, action being brought by the administrator *de bonis non*, it was ruled that under the new code of procedure, the contract, if made with the original administrator for the benefit of the estate, he, as the trustee of an express trust, was the proper party to sue. *Harney v. Dutcher*, 15 Mo. 89. And in *Rogers v. Gosnell*, 51 Mo. 466, it was held, that under the statute the party in whose name a contract was made, for the benefit of another, might maintain action upon it, being the trustee of an express trust, and that the beneficiary might, also, do the like, as a recovery by either would be a bar to another action by the other. See also, Bliss on Code Plead., §§ 45, 46.

It only remains to say that the plaintiff can maintain his action. Therefore, judgment reversed and cause remanded. All concur.

DOUGHERTY V. COOPER *et al.*, Appellants.

1. **Fraudulent Conveyances.** The right to dispose of one's property for an honest purpose, is not terminated by indebtedness or insolvency; although such a disposition may or does have the effect of hindering or delaying creditors.
2. ———: **BONA FIDE PURCHASERS.** A sale made with the intent to hinder, delay or defraud creditors will not be held invalid against the purchaser, if he buy without notice of such intent, and for a valuable consideration paid before notice of the vendor's fraud.
3. ———: ———. It is sufficient to invalidate a sale made with the

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intent to defraud creditors, that the purchaser knew of such intent. An instruction, therefore, requiring that he both know and be privy to the vendor's fraud, is faulty.

4. ——— : ——— : NOTICE. The levy of an execution by a creditor of the vendor upon the goods sold and in the possession of the purchaser, is notice to him of imputed bad faith in the sale, and if he thereafter pay the purchase money, or any part thereof, he will not be deemed as to such payment an innocent purchaser without notice, if such sale was fraudulent.
5. ——— : ——— : REPLEVIN. Where a purchaser pays part of the price before he has notice of the intent on the part of the vendor to defraud creditors by the sale, he is entitled to be protected to the extent of such payment. How such indemnity may be effectuated in the statutory action, in the nature of replevin, is considered.
6. ———. An instruction requiring the jury, before determining a sale to be fraudulent, to find that the vendor sold the goods with intent to hinder and delay his creditors; *Held, error*.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY,
Judge.

REVERSED.

Strong & Mosman and Johnston & Alderman for appellants.

L. Dawson and C. A. Anthony for respondents.

PHILIPS, C.—This is an action of replevin. One Sandifer was a merchant in the town of Graham, Nodaway county. The plaintiffs claim to have bought out his stock of goods about the 1st day of February, 1877, at the agreed price of \$2,250; the goods invoicing about \$2,400. Sandifer, at this time, was largely in debt, more than the amount of his assets, and was then being pressed by his creditors. Wells & Co. having obtained a judgment against Sandifer, the sheriff, Jos. M. Cooper, under an execution issued on said judgment, went to make a levy on said goods, or so much thereof as might be necessary to satisfy the debt, amounting to \$650, and costs \$4.95. Levy was made the 23rd day of March, 1877. When the sheriff went to make

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the levy, he informed plaintiff Dougherty that he was ordered to seize enough goods of Sandifer's old stock to satisfy the execution. And as it was mutually deemed least injurious to lock up the stock rather than remove part of the goods, plaintiffs locked the store and handed the key to the sheriff, who made return of levy on said date. On April 5th following, plaintiffs brought this action of replevin against the sheriff and judgment creditors and re-took the goods into their possession. The answer alleged that the sale of the goods by Sandifer was fraudulent as to his creditors and that plaintiffs were privy thereto, and had not paid anything for the goods.

The evidence tended to show that the circumstances under which the purchase was made were calculated to throw suspicion upon its integrity, and that the plaintiffs were apprised of Sandifer's financial embarrassment and the solicitude of some of his creditors, particularly of Wells & Co. The manner of the payment, as agreed upon, was substantially as follows: M. N. Dougherty agreed to turn over to Sandifer three notes on George and M. Mowry, amounting to about \$1,308. The balance was to be paid by conveying to Sandifer an interest in a house and lot in Graham and one-half the contents, consisting of a saloon, and the balance in money—realty estimated at \$540, and stock in saloon at \$372. The evidence left the fact in doubt as to whether any part of this purchase money was actually paid at the time of the levy in question. Touching the time of the transfer and the delivery of the Mowry notes, M. N. Dougherty, himself, says: "I think, but am not certain, that it was before the sheriff seized the store." As to the balance of the purchase consideration, there is no pretense that it was paid prior to the levy. In fact plaintiffs' evidence shows affirmatively that it was long after.

As is usual in such cases, a great number of instructions were unnecessarily asked, which will be noticed here after, so far as pertinent to the questions to be reviewed.

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The jury found the issues for the plaintiff, and the defendants bring the case here on appeal.

Two principal questions involved in the issue in the trial court were: Was the sale of the goods by Sandifer to hinder or delay or defraud his creditors? If so, were the plaintiffs participants in the fraud; in other words, were they purchasers in good faith? The fact that Sandifer was in debt or insolvent at the time of the alleged sale, did not destroy his *jus disponendi* over his property. He had the right to sell or dispose of it, provided he did so for an honest purpose and not to withdraw it from process for his just debts. An embarrassed debtor may make sale of his property which he deems advantageous to enable him to raise the necessary means for paying off his creditors and to prevent its sacrifice at forced sale under execution, and for this purpose the law recognizes his right to sell for cash or on time. *Hickey v. Ryan*, 15 Mo 62; *Buckner v. Stine*, 48 Mo. 407; *Green v. Tanner*, 8 Met. 411; *State ex rel. Peirce v. Merritt*, 70 Mo. 275; *Murray v. Cason*, 15 Mo. 379; *Waddams v. Humphrey*, 22 Ill. 661, 663; *Nelson v. Smith*, 28 Ill. 495. The fact that the sale may or does have the effect to hinder or delay the creditors, is not sufficient to avoid it. *Gates v. Labeaume*, 19 Mo. 17; as, to have that effect the debtor vendor must have entertained a design to hinder or delay his creditors, and that must be effectuated by making the sale. *Gates v. Labeaume*, *supra*; *Murray v. Cason*, 15 Mo. 379. Defendants' counsel seem to have framed their instructions in the main upon the idea, if Sandifer was largely indebted and in failing circumstances, and sold his property without having sufficient to meet his debts, the court should declare this to be a fraud. It might be evidence of fraud, a fact to be submitted to the consideration of the jury for their determination. And the question of fact—the intent—the court submitted favorably enough to the jury in the instructions given of its own motion. The court in previous instructions had properly advised the jury as to

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the necessity of finding the existence of a fraudulent intent on the debtor's part.

Finding such intent to exist on Sandifer's part is not sufficient, however, to invalidate the sale as against the
 2. ——— : bona fide plaintiffs, provided they were purchasers for
 purchasers. a valuable consideration without knowledge

of such fraudulent intent. In other words, if Sandifer's object in making the sale was to defeat his creditors, or Wells & Co., in their efforts to collect their debts, three conditions must concur to protect the title of the purchaser: 1st, He must buy without notice of the bad intent on the part of the vendor; 2nd, He must be a purchaser for a valuable consideration, and 3rd, He must have paid the purchase money before he had notice of the fraud. *Arnholz v. Hartwig*, 73 Mo. 485; *Bishop v. Schneider*, 46 Miss. 472; *Dixon v. Hill*, 5 Mich. 408; *Wormley v. Wormley*, 8 Wheat. 449. Had the defendants' counsel tried their case below on the theory invoked in argument here, a different result might have been reached by the jury, and certainly the questions to be decided here would have been simplified. Why the issue was indirectly presented by counsel and court to the jury, as to whether the plaintiffs had in fact paid the purchase money, or any part thereof, at the time of the levy of the execution is remarkable in view of the fact that it is conceded that over \$800 were not then paid, and it was debatable whether any of it had then been paid. If the purchase price was not paid at the time of the sale the plaintiffs could not protect themselves against Sandifer's fraud, if proved, by taking shelter under the cover of innocent purchasers. In the seventh instruction asked by defendants, a feint was made at raising this issue:

7. If the jury believe from the evidence that plaintiffs, after they received the goods in dispute, and before payment for the same by them to Sandifer in the manner stated in the evidence, knew of Sandifer's indebtedness, and that such transfer and disposition of Sandifer's effects would operate to delay or hinder Sandifer's creditors in

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the collection of their demands against him, then such alleged sale and transfer was void as to defendants and others, creditors of Sandifer, and their payment of any part of the purchase money, subsequently to the levy, for the goods, gave them no better right than they would have had without such payment.

The intended virtue of this instruction was, however, lost by carrying into it the vice common to defendants' instructions by asserting that if the sale had the effect to delay or hinder the creditors and the plaintiffs had knowledge thereof, "then such sale was void."

The nearest approach to the submission of this issue is found in the following instruction given on behalf of a —: —. plaintiffs:

1. If the jury believe from the evidence that Dougherty and Hutchinson, or either of them, purchased the goods in controversy, or any part thereof, from Sandifer, in good faith and for a valuable consideration, and said Dougherty and Hutchinson, or either of them, took possession of said goods prior to the levy thereon by defendant Cooper, and that said goods were in possession of said Dougherty and Hutchinson at the time of said levy, said Dougherty and Hutchinson acquired a valid title to said goods, and the validity of such sale will not be impaired or affected, notwithstanding said Sandifer, in making such sale, intended to hinder, delay or defraud his creditors, unless the jury shall further believe from the evidence that said Dougherty and Hutchinson, or either of them, knew of and were privy to such fraudulent design on the part of Sandifer at the time it was made, or before the contract of purchase was executed by payment for the same on the part of said purchasers by the delivery of the notes and property in payment thereof, according to the terms of said contract of purchase.

It is obvious on analysis of this instruction that it does not with directness present the issue. It is faulty in requiring the jury to find that Dougherty and Hutchinson

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"knew of and were privy to the fraud of Sandifer at the time they made the payment." The word "privy" should not have been employed. It was probably occult to the jury and was liable to misconstruction. The instruction should have said "knew of such fraudulent design on the part of Sandifer at the time it was made, or that they had paid the purchase price of said goods to him prior to the levy in question."

The making of the levy on the goods under the facts of this case, was notice to Dougherty and Hutchinson of
 4. ———: ———: the imputed bad faith in their purchase, and
 notice. after that they could make no payment in good faith; whereas this instruction by referring the jury to the time when "the contract of purchase was executed by payment, etc., according to the terms of said contract of purchase," was confusing and left the jury to infer that the plaintiffs were at liberty to pay at any time until they actually "knew of such fraudulent design," or that they were at liberty to pay "according to the terms of said contract," the terms permitting the half interest in the lot and saloon to be turned over long subsequent to the levy.

None of the instructions submitted deal with the question as to the effect upon plaintiffs' and defendants' rights
 5. ———: ———: dependent on the conceded fact that at the
 replevin. time of the levy over \$800 of the purchase money was not paid, nor even until after the suit was brought. There are respectable authorities holding that before the purchaser can maintain his position or be protected as an innocent purchaser, he must have paid the whole of the purchase money. This was the rule in England. But the better doctrine, and one most consonant with reason and justice, is that where the purchaser has paid a part of the price before notice of the fraud, he is entitled to be protected *pro tanto*. This question is well reviewed and the authorities collected in *Haughwout v. Murphy*, 7 C. E. Green (N. J. Eq.) 531, 547, 548, 549. The true rule of protection to him is indemnity. *Campbell v.*

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Nichols, 4 Vroom 87, 81; *Campbell v. Campbell*, 3 Stockt. 277. Such a purchaser by his contract acquires, as against his vendor, the right to the possession of the property, and the right to a perfected title on full performance on his part. But by section 2, Fraudulent Conveyances, Wagner's Statutes, all assignments of goods "with the intent to hinder, delay or defraud creditors," etc., are declared as against creditors "to be clearly and utterly void." All that will enable the vendee to avoid the denunciation of this statute is, that he has in good faith bought and paid the purchase money. Where he has paid only a part, while he may not retain the property against the defrauded creditor prior in right, yet equity will interpose for his indemnity to the extent of the money he has honestly put into the property prior to notice. Cases cited, *supra*. There is no question of this rule in equity. *Campbell, J.*, in *Dixon v. Hill*, 5 Mich. 409, says: "In equity a purchaser is protected to the extent of payments actually made and no further, even where future payments are provided for, unless those are secured in such a manner that the purchaser cannot be relieved against them. This could only happen where he gives negotiable paper; for upon a debt not negotiable, the failure of title would exonerate him. It is unnecessary to decide whether in a court of law a purchase can be assailed or apportioned where there has been a partial payment. In the case before us, no consideration whatever had been paid or secured. Such a purchase cannot avail either at law or in equity against the remedies of creditors." Why may not the rule be applied in our statutory proceeding in replevin, which in some respects is *sui generis*? Judge Napton, in *Dilworth v. McKelvy*, 30 Mo. 150, asserted that this statute possessed sufficient flexibility to adjust all such equities arising in the action. "The judgment in each case must be modified by the circumstances so that the merits of the controversy may be settled in one action. The statute is a general one, designed to meet all the exigencies which the old action of

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replevin did, and the equity of its provisions will embrace these modifications of the forms in which judgments should be entered." This construction is approved and applied in *Boutell v. Warne*, 62 Mo. 350, and in *Jones v. Evans*, 62 Mo. 382.

Applying the principle laid down in *Dilworth v. McKelvy* and *Boutell v. Warne*, there would be no difficulty under proper instructions in protecting and securing the rights of both parties. The sheriff, under his levy, held the property only for the purpose of making the judgment of \$650 and costs. That could be paid and leave the plaintiffs amply sufficient indemnity for the purchase money paid by them when the levy was made; for the conceded value of the whole property is \$2,250. As plaintiffs have possession of the property, should the issue be found for defendants on the ground last discussed, judgment on their election should be rendered only for the amount of the special lien or claim. *Seaman v. Luce*, 23 Barb. 254, 255; *Dilworth v. McKelvy*, *supra*.

In order that this case may be properly tried in accordance with the principles of law herein enunciated, I
a. — am of opinion that justice to the defendants requires a re-trial. In the event of another trial, it may be well enough to observe that the third instruction is faulty and amounts to error. It required the jury, in order to establish fraud against Sandifer, to find that he sold "the stock of goods * * * with intent to hinder and delay his creditors." The language of the statute is in the disjunctive—"hinder or delay." Such an instruction has been denounced by this and other courts. *Burgert v. Borchert*, 59 Mo. 80; *State ex rel. v. Nauert*, 2 Mo. App. 295.

The fifth instruction given for plaintiffs, was also bad :

5. The jury are instructed that if they believe from the evidence that at the time the sale and delivery of the goods were made, the sale and purchase were made in good faith and for a valuable consideration ; that no matter happening subsequently can render the sale fraudulent; and

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if the jury believe from the whole evidence, facts and circumstances, that the sale was made by Sandifer in good faith and for a valuable consideration, and the purchase made by plaintiffs in good faith and for a valuable consideration, and possession of said goods was immediately given to plaintiffs, and that said goods remained in the exclusive possession of the plaintiffs from the date of said sale until the same were levied upon and seized by the sheriff, they will find for plaintiffs.

In view of the importance which attaches in this case to the question of payment of the purchase money, the expression "no matter happening subsequently," was liable to misconstruction by the jury.

The judgment of the circuit court, in my opinion, ought to be reversed and the cause remanded for re-trial. MARTIN, C., concurs; WINSLOW, C., absent.

HOSKINSON *et al.*, Appellants, v. ADKINS.

1. **Evidence: COPIES.** A copy is not admissible in evidence, unless the absence of the original be accounted for.
2. ———. A recorder's certificate is not sufficient proof of a copy, where the original was improperly admitted to record.
3. **A Conveyance of the Wife's Land**, executed and delivered by the husband and wife, will not pass her title, nor the husband's marital interest, unless it be acknowledged, and the acknowledgment be certified, in the manner prescribed by statute.
4. **A Judgment against a Married Woman**, in a suit against her and her husband to foreclose a mortgage executed by them upon the land, which establishes no personal liability against her, but only charges the land with the debt, is not a judgment against her within the meaning and scope of the authorities which declare judgments in actions at law against married women to be void. *Fithian v. Monks*, 43 Mo. 502, and other cases distinguished.
5. **Immaterial Errors.** Errors not materially affecting the merits of an action, furnish no ground for reversing the judgment.

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Appeal from Putnam Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

A. W. Mullins for appellants.

Smith & Krauthoff with H. D. Marshall and Barnett & Christy for respondents.

The judgment of foreclosure established the validity of the mortgage sued on, and to that extent was binding upon the defendants. *Butterfield's Appeal*, 78 Pa. St. 197; *Lee v. Kingsbury*, 13 Texas 70; *Clark v. Boyreau*, 14 Cal. 634.

HENRY, J.—This is an action of ejectment instituted in the circuit court of Putnam county, to recover possession of the west half of southeast quarter and the east half of southwest quarter of section 34, township 65, range 19.

Wm. Adkins filed an answer denying all the allegations of the petition, except that of his possession of the land, and Kendall filed a separate answer, containing a general denial and a special defense consisting of the following facts: That Sarah and Van Manchester, under whom both parties claim title, on the 6th day of May, 1867, executed a mortgage by which they conveyed the land to Kendall Adkins as security for \$637.37, borrowed by said Van Manchester of him, and that in August, 1873, he instituted a suit against them to foreclose the mortgage, and in September, 1874, obtained a judgment thereon against Van Manchester for \$1,111.88, under which the land was sold, and the defendant, Kendall Adkins, on the 22nd day of February, 1875, became the purchaser, and in March following received a deed from the sheriff, conveying to him the land; that plaintiffs claim title by purchase from the Manchesters subsequent to the execution of the mort-

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gage, with notice of its existence, and that William Adkins was in possession under the defendant Kendall, and that Manchester was then, and still is, insolvent. The answer further alleges that defendant Kendall had made improvements upon the land amounting in value to \$225, and had paid taxes on the land aggregating \$130. All of these allegations were denied by the replication filed, except that Van Manchester and Sarah were husband and wife, and that defendant had paid taxes.

There was a judgment for defendants, from which this appeal is prosecuted.

It was admitted that the Manchesters owned the land prior to the conveyance to plaintiffs and defendants; and plaintiffs read in evidence a deed to them from Manchester and wife, dated March 26th, 1877, conveying the land in controversy, and rested.

The defendant, over the plaintiffs' objections, read a copy of his mortgage certified to be a correct copy of the record by the recorder of deeds of Putnam county. Plaintiffs' objections were that it was not properly acknowledged and that it was only a copy. The acknowledgment was taken by a justice of the peace of Davis county, in the state of Iowa, who testified that he took the acknowledgment, and that the mortgage was executed by Manchester and wife.

Conceding that the testimony of the justice of the peace was sufficient to prove the execution of the instrument, yet, without accounting for the absence of the original, the copy was not admissible.

The recorder's certificate was not sufficient to prove it a copy of the original. It was improperly admitted to
 1. EVIDENCE: copies
 2. — record, and, to his certificate, in such a case, the law attaches no more importance than to that of any other person who may have transcribed it at the request of the parties holding and claiming under it. The testimony of the justice, however, was probably sufficient to prove it a true copy and to warrant its admission if proof

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of the loss or destruction of the original had been made.

Under our statute a husband and wife may convey the wife's land by their joint deed, (§ 669, R. S. 1879,) but it must be acknowledged and the acknowledgment certified in the manner prescribed in section 676, which relates to the officers authorized to take the acknowledgment, and section 680, which prescribes how it shall be taken, and section 681, which declares what the certificate shall contain. The deed was not acknowledged before an officer authorized to take it, and the certificate does not contain what the statute requires. A married woman's title does not pass by the execution and delivery of the deed, but the acknowledgment is as essential as her signature and the delivery of the deed to give it effect. As the acknowledgment was defective the wife's title did not pass, nor did it convey the legal title to the husband's marital interest. 2 Wag. Stat., 938, § 14; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Goff v. Roberts*, 72 Mo. 570.

But defendants introduced in evidence the record and proceeding in the suit instituted by Kendall Adkins against Manchester and wife, in the circuit court of Putnam county, to foreclose the mortgage. The Manchesters were not residents of this State. They were notified by publication in pursuance of the statute, and, failing to appear, judgment was rendered against them by default, and the only alleged invalidity of the proceedings in that cause, is that the judgment rendered was against both Manchester and wife, and the appellants contend that this was such an error as rendered the judgment void as to both husband and wife. No doubt the authorities cited fully sustain the legal proposition. *Higgins v. Peltzer*, 49 Mo. 152; *Wernecke v. Wood*, 58 Mo. 352; *Fithian v. Monks*, 43 Mo. 502; *Smith v. Rollins*, 25 Mo. 408; *Pomeroy v. Betts*, 31 Mo. 419.

But the judgment in this case was not a judgment against the wife. The court adjudged "That the plaintiff do have and recover against defendants the said sum of \$1,111.88 for his debt and dam-

2. A CONVEYANCE
OF THE WIFE'S
LAND.

4. A JUDGMENT
AGAINST A MAR-
RIED WOMAN.

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ages, together with his costs, to be a lien upon and to be levied of the mortgaged property hereinbefore described. And it is further considered by the court, that the equity of redemption of the said defendants of and in and to the following described mortgaged property * * * be and the same is hereby forever foreclosed," etc. Section 3305, Revised Statutes, (§ 8, Wag. Stat., p. 955,) provides that, "When the mortgageor is not summoned, but notified by publication, and has not appeared, the judgment, if for plaintiff, shall be that he recover the debt and damages, or damages found to be due, and costs to be levied of the mortgaged property, describing it as in the mortgage." There was no judgment in this case, either against the husband or wife, that could be enforced by execution against any property of either except that mortgaged. While in terms it was adjudged that plaintiff recover against both, the amount of the mortgage debt and interest and costs, yet, in substance it but ascertains the amount of the debt and the interest, and subjects the mortgaged property alone to its payment. It establishes no personal liability against the wife for the debt, but only charges the property of which she had joined with her husband in a mortgage. In the cases cited by appellants' counsel, the judgments went further, not only charging the land of the wife, but as in *Fithian v. Monks*, averring that, if the real estate mortgaged proved insufficient to satisfy the debt, etc., the residue should be levied of other goods and chattels, etc., of the husband and wife.

Nothing appears in the record to warrant us in declaring the judgment void. The court may have erred in the foreclosure suit in holding that the mortgage was duly executed and acknowledged, but an error in that respect could have been reviewed only on appeal or writ of error. While the circuit court erred in admitting the copy of the mortgage in evidence, and in refusing declarations of law on that subject asked by plaintiff, yet as the judgment in the case of Adkins against

5. IMMATERIAL ERROR.

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Manchester and wife, and the purchase by Adkins at the sheriff's sale under that judgment, and the sheriff's deed to him, constitute a complete defense to the action, the errors committed in the court in the admission of the copy of the deed, and the refusal of instructions on that branch of the case, did not "materially affect the merits of the action," and furnish no ground for reversing the judgment, which is, therefore, affirmed. All concur.

HORRIGAN, *Appellant*, v. WELLMUTH.

1. **Mortgage: PAYMENT OF TAXES BY MORTGAGEE.** If the mortgagee fail to pay the taxes on the mortgaged premises, the mortgagee may pay them, and claim the benefit of the lien of the mortgage as security for the amount. But his claim must be enforced as a part of the mortgage debt, and not by an independent action against the mortgagee, as for money paid to his use or under claim of subrogation to the lien of the State or municipality.
2. **Mortgage, Extinguishment of.** Payment of the debt secured by a mortgage, will not extinguish the lien of the mortgage as a security for taxes properly paid by the mortgagee.

Appeal from Buchanan Circuit Court —HON. JOS. P. GRUBB,
Judge.

REVERSED.

Thos. F. Ryan and Vinton Pike for appellant.

Ewing & Hough and E. C. Zimmerman for respondents.

HOUGH, C. J.—The petition in this case is as follows: "Plaintiff, for his amended petition herein, states that defendants Cecile and William Wellmuth are husband and wife; that for ten years last passed the said Cecile Wellmuth has been and now is seized and possessed of the fol-

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lowing described lots or parcels of land in Buchanan county, State of Missouri, viz: the north half of lot 4, in block 55, in the original town of St. Joseph, and being so seized and possessed of said lot, did, together with her husband and by her certain deed, duly and legally executed and acknowledged, on the — day of —, 187—, convey the said lot to one James Horrigan, in trust for the purpose of securing payment of Cecile and William's certain promissory note of even date with said deed of trust, and which was due and payable in one year from its date, and in and by which the said Cecile and William promised to pay plaintiff the sum of \$—, with ten per cent interest from date; that said note was not paid at maturity, and remained unpaid and due plaintiff until the 19th day of December, 1877, when the amount thereof was tendered to and paid plaintiff by defendants, Cecile and William; that while plaintiff held said note and deed of trust, executed by said Wellmuths, as aforesaid, and before that time the defendants Wellmuths failed to pay the just and legal taxes duly and legally assessed and charged to said property by the State, county and city, as hereinafter set forth; that on and prior to the 22nd day of August, 1877, there were assessed and charged to said lot by the State and county, which were then a valid and subsisting lien upon said lot, the following taxes: For the year 1869, \$10.88; for the year 1870, \$14.10; for the year 1871, \$11.10; for the year 1872, \$15.12; for the year 1873, \$12.68; for the year 1874, \$18.53; for the year 1875, \$13.65; and for the year 1876, \$10.00; which said sums include interest and costs prior to January 1st, 1877, and amount to \$106.06, to which must be added interest and costs to date of payment hereinafter stated, which is \$13.59, making a total of \$119.65; that on and prior to the 21st day of August, 1877, there were due from defendants to the city of St. Joseph the following taxes, duly and legally assessed and chargeable against said lot, to wit: For the year 1867, \$49.43; for the year 1870, \$30.41; for the year 1871, \$56.49; for the

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year 1872, \$38.83; for the year 1873, \$30.67; for the year 1874, \$28.43; for the year 1875, \$30.10; for the year 1876, \$20.39; making a total of \$283.75, and which includes penalties and costs and interest to date of payment. The plaintiff further says that the defendant wholly failed and refused to pay any and all of said taxes, and that the same were duly returned delinquent by the collector of the city of St. Joseph, and the collector of the county of Buchanan, respectively, and judgment according to law was rendered against said property by the city recorder of said city and the county court respectively, and that the plaintiff, in order to preserve his security, was compelled to and did pay said taxes, and received the receipts of the respective collectors and treasurers therefor; that said plaintiff paid in all the sum of \$402.40, and is justly entitled to have the same charged upon and paid out of the property aforesaid; that defendants are wholly insolvent. Wherefore plaintiff prays judgment against the defendants for said sum of \$402.40, with interest thereon, and for costs, and that the same may be charged as a lien upon said property of said Wellmuths, and that the same be sold to pay the said demand and for all proper relief."

There was a default entered against the defendants who were duly served, and when the cause came on to be heard for final judgment, proof was made of all matters alleged in the petition, which were not admitted by the default, and thereupon judgment was rendered for the defendants. The only question before us, therefore, is whether the petition states any cause of action.

The law is well settled that when a mortgageor fails to pay the taxes upon land which he has mortgaged, the mortgagee may, for the protection of his interest in the land mortgaged, and in order to preserve the same as an available security for his debt, pay the taxes, and claim the benefit of the lien of the mortgage for the amount so paid: *Sheldon on Sub.*, § 9; *Jones on Mort.*, §§ 1080, 1134; *Johnson v. Payne*, 11 Neb. 269;

1. MORTGAGE: payment of taxes by mortgagee.

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Whittaker v. Wright, 35 Ark. 511; *Barthell v. Syverson*, 54 Iowa 160. But this claim must be enforced as a part of the mortgage debt, and cannot be made the basis of an independent action against the mortgageor, as for money paid to his use. *Johnson v. Payne*, *supra*; *Jones on Mort.*, § 1080. Nor do we think that the mortgagee should be permitted to institute an independent proceeding for the enforcement of the lien of the State, or of any county or city, by virtue of the law of subrogation. The right to pay the taxes is one which enures to the creditor as mortgagee, and it can only be enforced by him, therefore, in his capacity as mortgagee. Outside of the relation of mortgageor and mortgagee, the payment of the taxes of one man by another without some request, express or implied, would be such a voluntary payment as would not support an action. *Napton v. Leaton*, 71 Mo. 369.

The petition before us does not give the date of the mortgage, but the note secured by it, and of even date therewith, was overdue on December 19th, 1877, and being payable in one year from its date, the mortgage was certainly in existence in December, 1876. It is averred that certain State and county taxes were, on the 22nd day of August, 1877, a valid and subsisting lien on the land mortgaged, and that on the 21st day of August, 1877, there were due to the city of St. Joseph certain taxes legally assessed against said lot; that the defendants failed and refused to pay any of said taxes; that judgment was duly rendered against the land mortgaged by the city recorder of the city of St. Joseph, and by the county court of the county of Buchanan; that plaintiff was compelled to pay, and did pay said taxes in order to preserve his security as mortgagee. It appears that the amount of the mortgage debt was paid to plaintiff by the defendants on December 19th, 1877, but it does not appear that any release has ever been executed or that any entry of satisfaction has ever been made; and we think it quite clear, that as the mortgagee was entitled to receive

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the original debt, interest and taxes before the defendants could demand an entry of satisfaction or a release, the simple payment of the debt and interest, without more, would no more extinguish the mortgage, than the payment of the debt and taxes, without the interest, would extinguish it. It being fairly implied by the allegations of the petition that no release or entry of satisfaction has ever been made, the mortgage is still in existence as a security for the taxes paid, and may be enforced against the land. The petition is informal and defective, but we cannot say that it wholly fails to state a cause of action.

The judgment will be reversed and the cause remanded. The other judges concur.

JOHNSON V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY, *Appellant*.

1. **Railroads: NEGLIGENCE.** Plaintiff was driving, northwesterly, upon a public road, and stopped in a ravine about seventy-six steps from a railroad crossing, whence he could see the track to the east, looked and listened for a train, but neither seeing nor hearing one, he drove into a cut in an embankment which obstructed his view of the track, and, while passing through the cut, the brake of the wagon making a noise and frightening one of his mules, he looked back to see what was the matter with the brake. While in this position, and about one and one-half rods from the crossing, a train from the east came in sight of the mules and alarmed them, drawing plaintiff's attention to the train, when the mules, grown unmanageable, ran upon the crossing, and a collision occurred. The statutory duty of ringing a bell or sounding a whistle at and near this crossing had been neglected by the railroad company. In an action by the plaintiff against the company for the damages sustained by the collision; *Held*, that the trial court properly refused to direct a finding for the defendant.
2. ——— : ———. In an action for damages for injuries alleged by the petition to have been occasioned by the negligence of a railroad company in failing to ring a bell or sound a whistle, as required by

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section 806, Revised Statutes 1879, there was no evidence that the bell was rung or the whistle sounded, and all the testimony on the subject was that neither had been done. *Held*, that an instruction assuming that the negligence charged had been established, would have been justifiable, and that, therefore, an exception to an instruction based upon the hypothesis of negligence, not limited to the failure to ring a bell or sound a whistle, would be disregarded.

3. ———: ———. An instruction that it was the duty of plaintiff when approaching the railroad crossing to stop, look and listen for an approaching train, and that if he did not do so in time to prevent the collision, then the jury must find for defendant, was *held* to be objectionable in not requiring the jury to find as a further condition that plaintiff, by stopping, looking and listening, could have discovered the train in time to have avoided the collision.

Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB,
Judge.

AFFIRMED.

Shanklin, Low & McDougal for appellant.

Ramey & Brown and Bennett Pike for respondent.

NORTON, J.—This suit was instituted by plaintiff to recover damages for injuries to his person and property occurring at the crossing of a public highway, and alleged to have been occasioned by the negligence of defendant in failing to ring its bell or sound its whistle as required by section 806, Revised Statutes 1879, whereby the locomotive engine struck and killed one mule in a team and wagon being driven by plaintiff, and inflicting upon plaintiff injuries in his spine, back and bowels, rendering him a cripple for life. Judgment for the sum of \$5,150 as damages is prayed for. The answer of defendant, after admitting that it was a corporation, is a general denial. Upon the trial of the cause plaintiff had judgment for \$2,650, from which defendant has appealed, and assigns for error the action of the court in giving and refusing instructions.

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The instructions given on behalf of plaintiff, are as follows:

1. That if the jury find from the evidence that plaintiff sustained injury to his mule and wagon, and to his person, by reason of the carelessness, negligence or mismanagement of the agents or employes of defendant while running or managing an engine and train of cars attached, at the crossing of the public traveled road mentioned in the petition, at or about the time alleged, the jury will find for the plaintiff, and assess his damages at such sum as they may find from the evidence he has sustained by the injury complained of, not to exceed the amount stated in the petition, provided the jury may further find from the evidence that plaintiff was guilty of no negligence directly contributing to such injury.

4. If the jury find for the plaintiff as to the injury to his person, they should, in estimating the amount of damages, take into consideration the age and situation of the plaintiff, his bodily suffering and mental anguish resulting from the injury received; the loss of time and injury to his health, if any, and whether the said injuries are temporary or permanent in their character.

Defendant asked the following instructions:

1. The court instructs the jury to find for the defendant.

2. The jury are instructed that it was the duty of plaintiff, when approaching the crossing at which he was injured, to stop and look and listen for an approaching train, and if he did not stop and look and listen in time to prevent the collision, the jury must find for defendant.

3. If the jury believe from the evidence that when plaintiff came in view of the railroad track he was looking away from the track, and that he did not look at the track until his attention was attracted to the train by the action of his team, and too late to prevent the accident, the finding must be for the defendant.

4. If the plaintiff's view of the railroad track in the

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direction from which the train was approaching was obstructed, and the wind rendered it more than ordinarily difficult to hear the train, the plaintiff was bound to use greater care than would have been required if the view had been unobstructed and the wind favorable for hearing the train, and should, if necessary, have gotten down from his wagon and gone in advance of his team until he could see that the track was clear before going upon the track, and not to observe such precaution was negligence, and will prevent his recovery in this case.

The court refused all the foregoing instructions so asked by defendant, to which action of the court the defendant excepted.

The court then modified instructions numbered two and four, asked by defendant, so as to read as follows :

2. That it was the duty of plaintiff, when approaching the crossing at which he was injured, to look and listen for an approaching train, and if he did not look and listen in time to prevent the collision, the jury must find for the defendant.

4. If the plaintiff's view of the railroad track in the direction from which the train was approaching was obstructed, and the wind rendered it more than ordinarily difficult to hear the train, the plaintiff was bound to use greater care than would have been required if the view had been unobstructed and the wind favorable for hearing the train, and should, if necessary, have gotten down from his wagon and gone in advance of his team until he could see that the track was clear before going upon the track, and not to observe such precaution as under all the circumstances in the case was necessary and proper, was negligence, and will prevent his recovery in this case.

It is insisted that the first instruction asked by defendant, which is in the nature of a demurrer to the evidence, should have been given. Without encumbering the record with a detailed statement of the evidence, it may, after a thorough examination of

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it, be summarized as follows, viz: At the crossing where the injuries complained of occurred, the railroad track ran east and west, and the public road north and south. South of the crossing, at a distance of about seventy-six steps, a deep ravine crosses the public road from which the railroad track can be seen two or three hundred yards east of the crossing; the train which did the injury was traveling from east to west. Immediately north of said ravine the public road enters a cut in the bank of the ravine so deep as to prevent a train on the railroad east of the crossing, from being seen until the road emerges from said cut, which it does from twenty to forty feet south of the crossing, when the railroad track east again becomes visible to a person sitting in a wagon for thirty or forty feet. About eleven o'clock on the day of the accident, plaintiff was south of the crossing, driving north on the public road, with a farm wagon and a pair of mules. He testified that when he reached the ravine where he could see the railroad track east he stopped his wagon, looked and listened for a train, and, neither seeing nor hearing it, proceeded on his way and entered the cut, and in passing through it the brake on his wagon made a noise and frightened one of his mules which tried to run up on the bank; that he looked back to see what was the matter with the brake, and while in this position, about one and one-half rods from the crossing, the train came in sight of the mules; that they threw up their heads and attracted his attention to the train, which was right on him when it came in sight; that the mules became unmanageable, and ran upon the crossing where the collision occurred, resulting in a destruction to the wagon, injury to one of the mules and serious injury to plaintiff, among others causing rupture or hernia. No bell was rung or whistle sounded. Defendant introduced no evidence.

The duty is imposed by section 806, Revised Statutes 1879, on railroad corporations, of ringing a bell at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and

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ringing it continuously until its locomotive shall have crossed such road or street, or of sounding a steam whistle at least eighty rods from such road crossing, and also at intervals until such crossing shall be passed. For each failure to perform this duty a penalty of \$20 is imposed, to be sued for by the prosecuting or circuit attorney, and the corporation is also made liable for all damages sustained by reason of such neglect. Inasmuch as a railroad company has a right to use and operate its engines and cars on its road; and inasmuch as the public have an equal right to the use and transportation of themselves and property on a traveled public highway crossed by such road, collisions and accidents are likely to occur at such crossings, occasioning damage to the person and property of those having a right to the use of the public road, as well as to the property of railroad companies, and the persons of those who have entrusted themselves to be carried by railroads, the general assembly, in order to prevent such collisions and accidents and resulting consequences, has wisely enacted the above statute requiring railroad companies to sound notes of alarm at least one-fourth of a mile distant from each road crossing, and to keep them up till the crossing is passed, so that the traveler on the highway may receive timely warning of the approach of a train, govern his actions accordingly, and avoid the danger. These statutory signals when given proclaim both to man and beast on the highway the approach of a deadly and destructive instrumentality, and that there is danger in the path they are pursuing; while these signals are appeals to the reason of man to stop on the way till the danger is past, they are appeals to the instincts of animals to avoid it by flight.

While, on the one hand, when these statutory signals are given as required, the persons in charge of and operating the train have a right to presume that their warning voice will be heard and heeded by man and beast on the highway, the traveler on the highway, on the other hand, has a right to rely upon the presumption that a railroad

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company will obey the law, and observe and perform the statutory duty of ringing its bell or sounding its whistle, and when such duty is not in fact performed, and the statutory signals of an approaching train are not in fact given, if the traveler on the highway may not rely upon the presumption arising from this omission of duty, that there is no train within a quarter of a mile of the crossing, he, to say the least, might be fully justified as a prudent man in drawing that inference, and, acting upon it, proceed on his way. And even although the statutory signals should be given by a railroad company, if they should be unheard or unheeded, and a traveler undertake to cross, it would still be the duty of those in charge of the train to avoid a collision if the danger was discovered by them in sufficient time to enable them to do so; and, on the other hand, when the statutory signals are not given, if the traveler on the highway, who, by looking along the track of the railroad could discover an approaching train, and thus get the same information by his eye or ear that would be imparted through the ear by the statutory signals when given, fails to look, but rushes heedlessly on to the danger and suffers injury, he would be guilty of such contributory negligence as under our rulings in the cases of *Harlan v. R. R. Co.*, 65 Mo. 22; *Henze v. R. R. Co.*, 71 Mo. 636, and *Purl v. R. R. Co.*, 72 Mo. 168, would prevent a recovery for damages resulting from such injury.

Applying the above principles to the facts of the case in hand, it is manifest that the action of the court in refusing to take the case from the jury and direct a finding for defendant, was entirely proper. It is shown by the uncontradicted evidence that plaintiff stopped, looked and listened for a train, in the ravine crossing the public road, the only point before entering the cut at which a train could be seen, and the most favorable point for hearing one, and neither seeing nor hearing a train, and no signal of an approaching train being in fact given, he entered the cut, and emerging from it within from twenty to forty feet of the

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crossing, the train was right upon him, his mules became unmanageable, and the injury occurred. Had not the defendant disobeyed the law and disregarded a duty which it imperatively enjoined, and for the non-performance of which no excuse is receivable, the collision in this case, whereby a strong and robust man, according to the evidence, was injured to the extent of permanent disability, in the performance of his customary labor, would not, in all reasonable human probability, have occurred.

No importance is to be attached to the fact upon which counsel dwells, that while passing through the cut, when plaintiff's mules became frightened at the sudden noise of the brake on his wagon and tried to run up on the bank, that he looked back to ascertain the cause. Had he been looking forward or sideways he could not have seen the train, for the embankment would have obstructed the view of the track in the one case, and the train was not in front of him to be seen in the other.

The objection urged to the first instruction, that as to the question of negligence the jury should have been con-
2. —: —. fined to negligence in not ringing the bell or sounding the whistle, is more technical than substantial, for the reason that there was not a particle of evidence even tending to show either that the bell was rung or the whistle sounded. On the contrary, every witness who testified, and there were quite a number, swore that neither of these things was done, and the court would have been fully justified in assuming in the instruction that the negligence of defendant charged in the petition was established, and in so telling the jury.

The second instruction asked by defendant was properly refused, inasmuch as it allowed the jury to find for
3. —: —. defendant if plaintiff did not stop, look and listen for an approaching train in time to prevent the collision, without requiring the jury to go further and find that if by stopping, looking and listening an approaching

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train could have been discovered in time to have avoided the collision.

The third instruction was properly refused because it declares as a matter of law that if plaintiff looked back at his brake when one of his mules became frightened at the noise, and did not look at the track until his attention was attracted to it by his team of mules, he was guilty of such contributory negligence as would prevent a recovery, while the evidence clearly shows that plaintiff had stopped, looked and listened for a train at the only point, seventy-six steps from the crossing, where a train could be seen and the most favorable point for hearing the noise of one, and neither seeing nor hearing one, had, by the omission of defendant to perform a statutory duty, been inveigled into the cut, where a train could not have been seen had he looked.

The case seems to have been fairly tried, and we find nothing in the record justifying an interference with the judgment, and it is hereby affirmed. All concur, HOUGH and HENRY, JJ., concurring in the result.

LANDIS, *Appellant*, v. HAMILTON.

1. **Dedication by acts in pais:** EVIDENCE. In a case where, without judicial proceeding, or compensation, or solemn form of conveyance, it is sought to establish *in pais* a divestiture of the citizen's landed property in favor of the public, the proof ought to be so cogent, persuasive and full as to leave no reasonable doubt of the existence of the owner's intent and consent; and the conduct and acts relied on to establish the intent should be inconsistent and irreconcilable with any construction except such consent; nor must there be declarations and acts by the owner inconsistent with the dedication.

Tested by these rules, the evidence in this case fails to show a dedication.

2. **Practice.** Even where there is some evidence which might justify

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the trial court in submitting the case to the jury, yet if the whole evidence taken together is such that if it had been submitted and the jury had found a verdict for plaintiff, it would have been the duty of the trial court to order a new trial, this court will not reverse for a refusal so to submit.

3. **Dedication : ACCEPTANCE.** To constitute a dedication of property to public use there must be an acceptance by the public. This may be evidenced by user for a long period, or by its official recognition by the constituted authorities. The user should be such as to indicate that the enjoyment by the public is exclusive and not subordinate or incidental to the convenience of the owner.
4. **Estoppel.** It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for the costs and damages, will be bound by the litigation or procedure as much as the party to the record.

Thus, where a city, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterward the city declined to pay the damages that were assessed, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city." *Held*, that the citizens who instigated the proceedings were concluded from asserting a prior dedication of the same land for public use as a street.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY,
Judge.

AFFIRMED.

Bennett Pike and Doniphan & Reed for appellant.

Strong & Mosman and Spencer & Hall for respondent.

PHILIPS, C.—This action was instituted in 1875 in Buchanan circuit court and tried on change of venue in Andrew circuit court. The petition stated in substance that Fourth street was a public street in the city of St. Joseph, forming the eastern boundary of block 40; that James Hamilton, the father of defendants, owned lot 12 in this block in 1856; that he dedicated to the public in his lifetime ten feet of the eastern end of this lot adjoin-

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ing and cornering with Fourth street, and that said ten feet were accepted by the public and city as a thoroughfare; that in 1860 James Hamilton died, and the defendants inherited said lot; that said ten feet were used as such thoroughfare until 1869, when the defendants built on said lot a three story brick house covering said ten feet, "thereby obstructing the said street and preventing the use thereof by the public;" that afterward the plaintiff, who owned lot 10 in said block, and some sixty-five feet distant from lot 12, built a business house on his lot. The petition then alleged that the plaintiff was damaged by the erection of said house by defendants, in that it greatly impaired the value and desirableness of his place of business; that it affected the yearly rental of his property, and prayed judgment for \$5,000 damages.

The answer took issue as to the alleged dedication of said ten feet, and as to the obstruction and damages. It then pleaded specially that in 1866 the plaintiff presented a petition to the city council of St. Joseph praying that said ten feet be condemned to public use; that in connection therewith a proposition was submitted by plaintiff and others to indemnify said city against damages consequent upon such condemnation, and entered into a bond to that effect; that the city council accordingly passed an ordinance so condemning said ten feet. Defendants protested against the procedure. Notice was duly served on defendants by said city. A jury was empanelled to assess damages, who assessed defendants' damages at \$3,000. The council refused to affirm this assessment, and ordered a new jury, which assessed the damages at \$500. Defendants appealed to the circuit court, where the damages were assessed at \$3,000. The city appealed to the Supreme Court, where this judgment of the circuit court was reversed, on the ground that the city council had no authority to order the second jury and assessment; that the Supreme Court held that if the city was dissatisfied with the first assessment of damages, it might appeal therefrom

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or abandon the ground; that thereupon defendants called on said city council to pay said \$3,000, or to abandon said ten feet of ground, as they desired to build thereon. Thereupon, April 12th 1869, the city passed an ordinance abandoning said ground in accordance with the petition of defendants. Defendants relying thereon, and believing that neither the plaintiff nor the city could further claim said ten feet as appurtenant to said street, built thereon a house of the value of \$8,000, without protest and with full knowledge on the part of plaintiff and the city.

The essence of plaintiff's evidence to support the alleged dedication, was that two or three parties owning some of the lots north of lot 12, between 1857 and 1860, proposed to the city council to give ten feet off the end of their lots to widen said street, which the witness says was assented to, but no ordinance was passed nor was there any record evidence thereof. After this the city engineer marked out the line of the curbstone for the sidewalk, which was about three feet beyond where the ten feet in question extended. Sidewalk was to be twelve feet wide. This curbstone extended the whole front of the block. When the engineer was about the running of this line James Hamilton was seen there with him, but what he said does not appear. He had the curbing done. Afterward he built a temporary house on the lot, and set it back about ten feet. One Allen testified that in 1865 Mr. Hamilton stated to him that he had given ten feet to widen Fourth street, and that it made his lot more valuable. This ten feet seems to have been used for the sidewalk up to the time of Hamilton's death in 1865.

On the other hand, defendants' evidence showed that Hamilton stated, angrily, to Donnell, who was trying to get the assent of the lot owners to give to the city the ten feet, that he never would consent. The records and the papers in the condemnation proceedings were put in evidence in support of the answer.

Plaintiff also offered evidence tending to show that

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his store-house was not so desirable as a business stand on account of defendants' house obstructing the view, and possibly injured its rental value.

The plaintiff asked the following instructions:

1. No particular form is necessary in the dedication of land to public use. It may be made by the owner thereof without deed or writing, all that is necessary being the giving up by the owner of the use and occupation of the land to the public, with the intention that the public shall have the permanent and exclusive right of such use, and common use and occupation by the public. In order to determine whether such intention exists in this case, the jury have a right to take into consideration all the facts and circumstances of the case in proof, touching the question of intention to dedicate on the part of Jas. Hamilton, Jr., and any state of facts which would have bound Jas. Hamilton, Jr., will bind these defendants.

2. If the jury believe from the evidence that Jas. Hamilton, Jr., in March, 1856, purchased lot 12, block 40, in the city of St. Joseph, and that while such owner, he dedicated, within the meaning as given in the first instruction, ten feet from the eastern end of said lot, to the public use as a thoroughfare, and the same was accepted by the public as a part of such thoroughfare, and that these defendants, as the heirs of said Hamilton, and owners of said lot after his death, built a three story house, extending over and across said strip, so as to prevent and obstruct the use thereof by the public, and that plaintiff's store-house, situated on lot 10 of said block, has depreciated in rental value in consequence thereof, then they will find for the plaintiff, and assess his damages at such sum, not exceeding \$5,000, as the evidence shows plaintiff has been injured by such depreciation.

3. The jury must be satisfied, from the evidence, that there was an acceptance by the public of the said strip of land, so, as aforesaid, intended to be dedicated by said Jas. Hamilton, Jr. But the acceptance need not be shown by

positive formal ordinance of the city, but may be shown by user on the part of the public or the city, or by care thereof and control thereover by the public authorities of said city in such way as to evince an intention on the part of the city to accept and recognize the said ten feet in question as a permanent part of said street.

4. If the jury should believe that the facts and circumstances, as detailed in evidence, show a dedication of ten feet from the east end of said lot 12 to the public use, as a part of Fourth street, by Jas. Hamilton, Jr., the owner in fee thereof, then they are instructed that any subsequent proceeding on the part of the city to have the same condemned, as introduced in evidence, could not and did not revert the said Hamilton or his heirs with the right thereto or the control thereover.

The court gave the first three of said instructions, and refused to give the fourth instruction as asked, but gave the same with the following modification :

" But said proceedings for condemning said ten feet, together with the ordinance of the city, read in evidence, entitled 'An ordinance abandoning a part of lot 12 in block 40, original town, now city, of St. Joseph, Missouri, near the corner of Fourth and Edmond streets,' is a recognition of the right of defendants to said ten feet, and defendants in building on said ten feet, after the adoption of said ordinance, did not commit a nuisance for which plaintiff can recover."

To which opinion of the court refusing said fourth instruction as asked, and giving it as modified, the plaintiff excepted. The court then, at its own instance, gave the following instruction :

If the jury believe from the evidence that about the year 1866, defendants claimed the ten feet in controversy as their own property, and the city, at the request of the owners of property in said city, instituted proceedings to condemn said ten feet of ground for and as a part of Fourth street, for public use, and said proceedings resulted in the

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assessment of damages in favor of defendants, as the owners of said lot 12, in the sum of \$3,000, and that said city refused to pay said damages, and that defendants requested said city to abandon the said ten feet of lot 12 to them, and that thereupon the city did adopt the ordinance in evidence, in relation to the same, entitled "An ordinance abandoning a part of lot 12 in block 40, original town, now city, of St. Joseph, near the corner of Fourth and Edmond streets," such ordinance is an abandonment of the claim of the city to said ten feet as a part of the street, and would authorize defendants to enter upon the same and erect improvements thereon; and if you further find from the evidence that defendants erected the building complained of after the adoption of said ordinance, without any objection or interference on the part of the city authorities, the erection and maintenance of said building on said ten feet of ground does not constitute a nuisance for which plaintiff can recover, in causing injury to his property built after the said ten feet was so abandoned, and defendants had built their house on the same, and you should find for defendants.

Thereupon plaintiff took a non-suit, with leave to set the same aside. And, after an ineffectual effort to obtain a new trial, brings the case here on appeal.

Counsel have discussed, with much learning and force, many interesting questions incidentally connected with this case. They have not been neglected nor evaded. But there are one or more governing principles of law pertinent to the facts of this case which render discursive discussion unnecessary.

The plaintiff seeks to recover from the defendants damages as in case of levying a nuisance, for erecting a house on ground which plaintiff admits once belonged to defendants' father. His right to maintain the action depends on an alleged dedication by the ancestor to the municipal government of St. Joseph. In a country like ours, where landed estates are allodial,

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the law is justifiably jealous of the methods by which such estates are taken away from the private citizen and put into the control of an intangible public, state or municipality. This feeling or thought finds its best expression and safeguard in that provision of our organic laws which forbids the taking of private property, even for public use, without just compensation to the owner. In a case, therefore, where, without judicial proceeding or compensation, or solemn form of conveyance, it is sought to establish *in pais* a divestiture of the citizen's landed property in favor of the public, the proof ought to be so cogent, persuasive and full as to leave no reasonable doubt of the existence of the owner's intent and consent. *Irwin v. Dixon*, 9 How. 30, 31; *Brinck v. Collier*, 56 Mo. 164, 165. The conduct and acts relied on to establish the intent of the owner should be "inconsistent and irreconcilable with any construction except such consent." *Irwin v. Dixon*, *supra*, and authorities cited. Nor must there be declarations and acts by the owner inconsistent with the dedication.

Tested by this standard the facts relied on by plaintiff were scarcely sufficient to justify the trial court in submitting the case to the jury. It appeared that Donnell and others were endeavoring to secure a concession of the ten foot frontage on the street to the city. Is it not remarkable that plaintiff could not prove by Donnell, whose deposition was taken, that Hamilton joined him in the application or directly consented thereto? Why did he not ask him to join or consent? When others were moving in the matter there is not one word of Hamilton's co-operation. This is significant to my mind.

Hamilton, it is asserted, was present when the engineer made a survey of the curbstone line. What he said or why he was there, whether protesting or acquiescing, all is left to conjecture. Who sent this engineer there? Was it the city or the interested parties seeking the widening of the street? Is it a safe rule of law to suspend the title of land upon such conjectures?

It is said that Hamilton did not build his temporary house to the outermost verge of his lot. Was that inconsistent with an assertion of ownership over this ten feet? Had he not a right to place his house or his fence on any part of his own lot he chose? Forsooth, in the condition of affairs existing in our towns for the period running from 1860 to 1865, the owner, with a mere temporary structure on his lot, did not occupy the utmost limit of his lot, and indulged the public in its use as a pass-way for a few years until he needed it for his exclusive use, shall his title to the part, *nolens volens*, be appropriated perpetually to the public accommodation?

True it is, a witness says that in 1865 Hamilton said he had given the city ten feet of this lot. The unsupported rehearsal after a lapse of twelve years of the one utterance of a man long since dead, should be most cautiously received, and ought not to support a verdict taking away title to land, especially when other occurrences contradict the force if not the existence of the fact.

If this was sufficient to have justified the submission of the issue to the jury, there is other uncontradicted evidence in the case that should have persuaded the trial court to grant a re-trial had the verdict gone against the defendants. In such a case this court will not reverse the judgment when for the right party.

Defendants' evidence showed contrary statements of Hamilton protesting to Donnell that he would not concede this ten feet of ground, corroborated by like statements to the defendants. Superadded to this is the admitted and indisputable act of the plaintiff and the adjacent interested lot owners in 1866 recognizing the necessity of procuring a divestiture of Hamilton's title to this ground by condemnation proceedings. This shows that this plaintiff and the public felt, in the language of the court in *Irwin v. Dixon*, *supra*, p. 30, that the acts and words of Hamilton were insufficient, because they were "equivocal or ambiguous on the subject."

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There is, too, another important element in the constitution of a dedication of property to public use. There must be an acceptance by the public. This
 3. DEDICATION: ac-
 ceptance. may be evidenced by user for a long period or its official recognition by the constituted authorities. The user, essential to indicate such acceptance, should be such as to indicate that the enjoyment by the public is exclusive; that it is not subordinate nor "incidental to the convenience of the owner, who would not be captious in preventing others from traveling the same road so important to himself." *Brinck v. Collier*, 56 Mo. 166. Certain duties, responsibilities and rights attach to the ownership of real estate by a municipal corporation. Therefore it is important—of the very essence of self-protection—to these municipal governments, that their assent should be had before the burden is thrust upon them. And in view of the fact that plaintiff proved that about 1860 Donnell and others had asked the council to accept the offering, is it not significant that no acceptance appears of record? Napton, J., in *Brinck v. Collier*, *supra*, clearly intimates his approval of adjudicated cases holding that such acceptance ought to be manifested in a case like this by the official act of "the duly constituted agents."

But what is more conclusive still against any acceptance by the city, is the fact that in 1866 by public ordinance the council recognized this ten feet of ground as the property of these defendants, and entered solemn judicial proceedings, on due notice to these defendants, to condemn the ground in order that the public might obtain its use. For three years the city held defendants in court at great expense in a struggle to wrest this very title from them. The basis of this proceeding under the city charter was, that the ten feet of ground was private property. That struggle ended in this court. 43 Mo. 282. Pursuing a suggestion of the court in that decision, the defendants made request on the city council to either pay the amount assessed by the jury, or abandon the matter. Thereupon

the council adopted a formal ordinance declaring "that the part of lot 12, block 40, sought to be condemned for the purpose of opening and widening of Fourth street, be abandoned by the city," etc. It is not material to the determination of this appeal to decide the question discussed by counsel as to whether this in effect did not amount to a vacation and surrender by the city of this portion of Fourth street.

There can be no question of the proposition that if the city itself were before the court, immediately, asserting
4. ESTOPPEL. title to this ten feet through a dedication by defendants' ancestor, the whole condemnation proceedings and ordinances of the city would constitute a complete estoppel against it. *Wright v. The Town of Butler*, 64 Mo. 165. Is not the plaintiff likewise estopped? To induce and promote the condemnation proceedings he signed the following paper:

"ST. JOSEPH, MO., July 5th, 1866.

To the Honorable Mayor and City Council, St. Joseph:

We, the undersigned, in view of the resolution passed at the last meeting of your honorable body appointing a committee to draw up an ordinance condemning certain property on Fourth street, provided the city should be indemnified against expense, would respectfully represent to your honorable body that we will cheerfully donate to the city that part of our respective lots already lying in the pathway, and promise to pay our *pro rata* of the expense the city may be at in condemning property not donated."

Accordingly, on the 18th day of August, 1866, he joined in a bond under seal for \$5,000, to the city, with the following condition: "The condition of the above bond is such that, whereas, the city of St. Joseph has adopted an ordinance to widen Fourth street, between Felix and Edmond streets, and on the west side of Fourth street, ten feet being taken off the east end of lots fronting on Fourth street; and whereas, property on said street has to be condemned in order to carry out said ordinance, and as the

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widening of said street will be an advantage to the undersigned; Now, therefore, if the undersigned will well and truly pay off and satisfy all such damages as may be assessed in the condemnation of said property, then the bond to be null and void, otherwise to be and remain in full force and virtue in law."

It is not always essential to the creation of an estoppel that the person should be a party to the record, but one who thus instigates and promotes the litigation for his benefit by employing counsel, binding himself for the costs and damages, will be bound by the litigation or procedure as much as the party to the record. *Stoddard v. Thompson*, 31 Iowa 80; *Lovejoy v. Murray*, 3 Wall. 1, 18. "Where one is bound to protect another from a liability," he is bound by the litigation, provided he had notice and opportunity to control and manage the case. *Strong v. Phoenix Ins. Co.*, 62 Mo. 295. The plaintiff was bound to protect the city, he had notice, he had opportunity to control the proceeding. He could have withdrawn his bond of indemnity and forced a discontinuance of the action; but he let it remain. The proceeding, as shown by his petition and bond, was for his immediate benefit. He thereby put the defendants to great trouble and expense on his direct admission that this ground was defendants' private property. Upon the abandonment by the city, the defendants erected a large and costly edifice on this lot. The plaintiff did not build until after the defendants had. And now, after standing by for five years, he comes with this action asserting a dedication and a nuisance. He cannot maintain the action. The judgment of the circuit court should, in my opinion, be affirmed. MARTIN, C., concurs; WINSLOW, C., absent.

THE STATE V. WEBSTER, *Appellant*.

1. **Felonious Assault to Kill.** The indictment in this case charging a felonious assault with intent to kill, punishable under section 29, page 449, Wagner's Statutes; *Held*, to be good under that section.
2. ———. A person indicted under section 29, page 449, Wagner's Statutes, for a felonious assault with intent to kill, could not be convicted and punished under section 32, page 449, Wagner's Statutes. It was not until the Revised Statutes 1879, (section 1655,) that upon an indictment for a felonious assault, the defendant could be convicted of a lower offense.

Appeal from Schuyler Circuit Court.—HON. ANDREW ELLISON,
Judge.

REVERSED.

Jno. D. Smoot for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—Defendant was indicted in the Schuyler county circuit court at its March term, 1876, for a felonious assault with intent to kill. He was tried at the March term, 1878, of said court, was convicted and his punishment assessed at a fine of \$100, from which judgment he has appealed to this court.

In the motion for a new trial and arrest of judgment the validity of the indictment is questioned as well as the action of the court in giving and refusing instructions. Omitting the formal parts of the indictment, it alleges that Samuel Webster, with force and arms, at the county of Schuyler, and State aforesaid, upon the body of one John T. Varner, in the peace of the State then and there being, feloniously, on purpose and of his malice aforethought, with a deadly weapon, to-wit: a knife, which he, the said Samuel Webster, in his hands then and there held, did then and there make an assault, and him, the said John T. Varner, strike and wound with

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said knife, with the intent him, the said John T. Varner, then and there to kill, contrary to the statute in such cases made and provided, and against the peace and dignity of the State. This indictment sufficiently charges an offense under section 29, Wagner's Statutes, 449, and follows the form of an indictment founded upon section 34, Revised Statutes 1845, precisely like section 29, *supra*, and which was expressly approved by this court in the case of the *State v. Chandler*, 24 Mo. 371.

The only remaining question for our determination is whether defendant, who, as we have seen, was indicted for 2. — an assault made, feloniously, on purpose and with malice aforethought, could be convicted and punished as for an offense under section 32, Wagner's Statutes, 449. We have not been able to find anything in the statute in existence when this offense was committed, or in the decisions of this court in construing the above sections, which would warrant us in answering this question in the affirmative. We have been cited by the attorney general to the case of the *State v. Seward*, 42 Mo. 206, as authority and upholding such a conviction. All that is determined by that case is that an indictment which fails to set out the offense defined by the said 29th section, if it contains a complete and sufficient description of an offense designated in the said 32nd section, will authorize a conviction under the latter section. It is not decided in the above case that an indictment which comes up to the requirements of section 29, and sufficiently alleges the offense therein designated will authorize a conviction under section 32. On the contrary, a different intimation is given, as an examination of the case will show. It follows that the trial court erred in instructing the jury to the effect that they might find defendant guilty under section 32, which instruction they followed.

Since the trial of this cause, which occurred in March, 1878, the legislature, by a new section incorporated in the Revised Statutes of 1879, have provided that "upon an

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indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a lower offense; and in all other cases, whether prosecuted by indictment or information before a justice of the peace, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him. The enactment of this new section is equivalent to a legislative declaration that the things authorized to be done under it, could not be done anterior to its adoption.

For the error above indicated, the judgment will be reversed and the cause remanded, in which all concur.

THE STATE, *Appellant*, v. AMOR.

Selling Liquor to Minor. The selling of intoxicating liquor by a dramshop keeper to a minor without the consent of his parent, guardian or master, is not an indictable offense. The only penalty prescribed by law is a forfeiture of \$50, to be recovered by civil action against the offender on his bond. Wag. Stat., p. 552, § 20; R. S. 1879, § 5454.

Appeal from Jefferson Circuit Court.—HON. L. F. DINNING,
Judge.

AFFIRMED.

Indictment for selling intoxicating liquor to a minor without the consent of his parent. Held bad upon demurrer. The State appealed.

D. H. McIntyre, Attorney General, for the State.

W. H. H. Thomas for respondent.

SHERWOOD, J.—The only question before us is whether

the indictment charges any offense against the laws of this State. The indictment was returned June 25th, 1879, and is based upon section 20, page 552, 1 Wagner's Statutes, which section provides: "Every dramshop keeper who shall sell, give away or otherwise dispose of any intoxicating liquors, in any quantity, to any minor, without the permission of the parent, master or guardian of such minor first had and obtained, shall forfeit and pay to such parent, master or guardian, for every such offense, \$50, to be recovered by the party entitled to sue, by civil action, in any court having competent jurisdiction, against such dramshop keeper, or by suit in such court, in the name of the county, to the use of such person," etc., etc. On turning to section 30, page 516, 1 Wagner's Statutes, we find it provided that: "Whenever a fine, penalty or forfeiture is or may be inflicted by any statute of this State, for any offense, the same may be recovered by indictment, * * notwithstanding another and different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture," etc. And it is contended that under the provisions of this section, the act charged in the indictment was an indictable offense.

This position we regard as untenable, for the reason that section 36 on the same page as the section just quoted, provides that "The terms 'crime,' 'offense' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment or fine, or both, may, by law, be inflicted." Now, when we turn again to the Dramshop Act, we find that according to its provisions, neither fine nor imprisonment can be inflicted as a punishment for selling or giving away intoxicating liquors to a minor. This being the case, it must needs follow that such an act as that charged in the present indictment, does not, under the provisions and definitions of section 36, *supra*, constitute an "offense" against the laws of this State. In section 15 of the Dramshop Act it is provided that: "Any

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person convicted of a violation of any of the *preceding* provisions of this chapter shall be fined in a sum," etc. Had the qualifying word which we have italicized, been omitted from this section, doubtless the defendant would have been guilty of an "offense" had he done the act charged in the indictment, and the indictment would, therefore, have been good. As it is, judgment affirmed. All concur.

THE STATE, *Appellant*, v. BURNETT.

Giving away Liquor on Sunday. The giving away of intoxicating liquor on Sunday, by a dramshop keeper, is not an indictable offense. The only penalty prescribed by law is forfeiture of his license and prohibition against obtaining another license for a term of two years. Wag. Stat., p. 553, § 22; R. S. 1879, § 5456.

Appeal from Washington Circuit Court.—HON. L. F. DINNING,
Judge.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

Van Allen & Harris for respondent.

NORTON, J.—The defendant was indicted in the Washington county circuit court for giving away, as a dramshop keeper, intoxicating liquors in and about his premises on Sunday, the first day of the week. He was convicted and his punishment assessed at a fine of \$5. Defendant filed his motion in arrest, alleging as grounds therefor that the "indictment does not charge any crime against the laws of the State;" that the giving away liquor by a dramshop keeper on the first day of the week, commonly called Sunday, is not declared to be an offense by the statute, nor is it an offense at common law. This motion was sustained,

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and the State has appealed from the action of the court in that respect.

The indictment was preferred before the Revised Statutes of 1879 went into effect, and is founded upon section 22, page 553, Wagner's Statutes, which declares that "any person having a license as dramshop keeper, who shall keep open such dramshop or shall sell, give away or otherwise dispose of (or suffer the same to be done,) upon or about his premises, any intoxicating liquors in any quantity, on the first day of the week, commonly called Sunday, shall upon conviction thereof, in addition to the penalty now provided by law, forfeit such license, and shall not again be allowed to obtain a license to keep a dramshop for the term of two years next thereafter." While under section 35, Wagner's Statutes, a dramshop keeper who keeps his grocery open, or who sells or retails intoxicating liquors, on Sunday, is guilty of a misdemeanor, and subject to be fined not exceeding \$50, the giving away of such liquor on Sunday is nowhere declared to be a misdemeanor, nor does the dramshop keeper giving it away subject himself under any statute to the payment of a fine. The only penalty under existing laws imposed upon a dramshop keeper for giving away intoxicating liquors on Sunday, is a forfeiture of his license, and a prohibition against his obtaining license for two years after being convicted of the violation of the law in so giving it away. And while giving away intoxicating liquors on Sunday by a dramshop keeper is a violation of section 22, *supra*, it has not been made by the legislature either a misdemeanor or offense, for which a prosecution by indictment can be maintained.

It is claimed by the attorney general that an indictment for such a violation of law is authorized by section 30, Wagner's Statutes, 516, which declares that "whenever any fine, penalty or forfeiture is or may be inflicted by any statute of this state, for any offense, the same may be recovered by indictment * * notwithstanding another and different remedy may be specified in the law

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imposing the fine, penalty or forfeiture, provided that in all cases, the fine, penalty or forfeiture shall go to the State, county, corporation, person or persons to whom the law imposing the same declares it shall accrue."

We are of the opinion that the claim made by the attorney general is not well founded, for the following reason: Said section 30 only authorizes "an indictment" for the recovery of a fine, penalty or forfeiture inflicted by any statute for an "offense," and unless giving away intoxicating liquors by a dramshop keeper is an offense in the sense in which that word is used in said section, he cannot be prosecuted by indictment. That it is not an offense in the sense in which the word is used in said section 30, is clearly shown by the following section 36, which provides that "the terms 'crime,' 'offense,' 'criminal offense,' when used in this or any other statute shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted." Inasmuch as there is no law to be found in the statutes of this State inflicting the punishment of either fine or imprisonment, or both, on a dramshop keeper, for giving away intoxicating liquors on Sunday, it is not an offense for him to do so in the sense in which that word is used in section 30, *supra*, and it, therefore, necessarily follows, that the prosecution by indictment for such violation of law cannot be maintained, and that the action of the circuit court in sustaining defendant's motion in arrest of judgment was rightful.

Judgment affirmed, in which all concur.

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DALLAS COUNTY, *Plaintiff in Error*, v. MERRILL.

County Bonds: CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS. The fact that county bonds held void by the courts of this State are held valid by the courts of the United States, and, therefore, when transferred to a non-resident holder may be enforced against the county, will not authorize the courts of this State to require a resident holder of such bonds to deliver them up to be cancelled.

Error to St. Louis Court of Appeals.

AFFIRMED.

This was a suit against Jacob S. Merrill, the Bank of St. Louis, and the Metropolitan Bank of St. Louis, to compel them to bring certain bonds of the county of Dallas into court to be cancelled. The petition was as follows:

1. That on the 8th day of April, 1873, the following petition was filed in the circuit court of Dallas county:

To the Honorable Robert W. Fyan, Judge of the Circuit Court of the County of Dallas:

The petition of the Metropolitan Bank of St. Louis, Missouri, respectfully sheweth: That said petitioner is a corporation, duly incorporated, organized and in existence, under and by virtue of the laws of the State of Missouri; that on or about the 5th day of August, 1869, the county of Dallas, in the State of Missouri, by an order of record, made and declared by the county court of said county, at the August term, 1869, for good and valuable considerations, and under and by virtue of the power and authority conferred upon it by the 14th section of the act next below cited, subscribed the sum of \$150,000 to the capital stock of the Laclede & Ft. Scott Railroad Company, a corporation duly incorporated and organized under and by virtue of an act of the general assembly of this State, entitled "An act to incorporate the Laclede & Ft. Scott Railroad Company," which said act was approved January 11th,

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1860, and in payment of said subscription, and under said order, issued 150 bonds of said county of the denomination of and face value of \$1,000 each, said bonds being numbered successively from one to 150, inclusive of both numbers, being dated the 1st day of July, 1870, being negotiable and bearing interest at the rate of seven per cent per annum, said interest being payable on the 1st day of January and on the 1st day of July of each year, on the presentation and delivery at the German American Bank, in the City of New York, of the interest coupons attached to each bond; and at the same time, and under and by virtue of the same order, said county made and executed its certain promissory notes, to the number of 6,000, by each of which it promised to pay to the bearer at said bank, the sum of \$35, all of said notes being dated on said 1st day of July, 1870, and 150 of them falling due every six months during said period of twenty years, forty of said notes commonly called interest notes, or coupons, being attached to each of said bonds, and being issued for and in consideration of the semi-annual interest on each of said bonds respectively, from the date of its issue until maturity; that by mistake, the date of the said order, under which they were issued, was printed in said bonds as August 17th, 1869, but afterward, to-wit: on or about the 5th day of January, 1871, the issue of said bonds was ratified and confirmed as if said order bore date August 17th, 1869, instead of August 5th, 1869, by the said county court of Dallas county; that afterward, said bonds, with the interest coupons thereon, were delivered by said Dallas county to the said Laclede & Ft. Scott Railroad Company in pursuance of the objects for which they were issued and in the usual course of trade and exchange for value by purchase and assignment from the original holder and various intermediate assignees; that petitioner, before the same were due, became and now is the owner of fifteen of them numbered 1, 2, 5, 8, 9, 10, 11, 12, 13, 14, 19, 21, 22, 23 and 27, and of the interest notes or coupons thereunto

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attached, for the semi-annual interest due July 1st, 1872, January 1st, 1873, and from those dates to maturity of the bonds; that the semi-annual interest on said bonds due July 1st, 1872, and due January 1st, 1873, is now due and still unpaid thereon; that although upon said 1st day of July, 1872, and said 1st day of January, 1873, and on divers days between then and now, both at the German American Bank, in the City of New York, and at the office of the treasurer of said Dallas county, and elsewhere, payment of said interest notes or coupons has been demanded, yet the said county of Dallas did not pay the same, nor cause the same to be paid, neither did it place funds to pay the same, either at said bank, or elsewhere, nor had it any funds anywhere on said 1st day of July, 1872, or 1st day of January, 1873, nor since those dates, to pay the same, nor has it raised any funds by taxation or otherwise, for said purpose, but has wholly failed, neglected and refused, and still does fail, neglect and refuse to do so, though often thereunto requested. Wherefore your petitioner prays for an order directing and commanding said county court of Dallas county, forthwith, to provide and set apart funds to pay off said interest evidenced by said coupons, which are herewith filed belonging to your petitioner, in such way and by such means as are provided by law; and in case it shall appear, that said county is not possessed of any funds, property, stock, scrip or assets, the proceeds of which can lawfully be applied to the payment of said interest, that the said county be ordered and commanded to levy a tax upon property within it subject to taxation, sufficient to pay the same, and that they apply the same to the payment of said interest notes, and for such other and further orders and relief as shall be adequate and necessary.

2. That on the 8th day of April, 1873, an alternative writ of mandamus was issued out of the circuit court of Dallas county directed against the county court of Dallas

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county in conformity with the request and prayer of the petition aforesaid.

3. That on the 17th day of April, 1873, the county court of Dallas county, respondent in said alternative writ of mandamus, filed in the circuit court of said Dallas county the following return:

Now comes the respondent, and for return to the alternative writ of mandamus issued in the above cause at the instance of the relator, says: Respondent admits that one John R. Gammon, judge of the county court of Dallas county, and Wm. J. Soafman, clerk of said court, did issue certain bonds and coupons, purporting to be the bonds and coupons of the county of Dallas, to the amount of \$150,000, said bonds purporting to be issued in payment of stock to the Laclede & Ft. Scott Railroad Company. But respondent states that said Gammon and said Soafman did said act without authority of said county, and without authority of any law then existing and authorizing them so to do. Respondent admits that on the 5th day of August, 1869, the said county court of Dallas county, did make a conditional order purporting to take stock in the Laclede & Ft. Scott Railroad Company to the amount of \$150,000; but avers that said order was made without authority and was and is null and void; that said county court subscribed said stock to said railroad company without, in any way, submitting such subscription to the approval or disapproval of the resident voters of said county, nor were said voters permitted to express by vote their disapproval of said proposed subscription, nor did said voters or any of them, vote for said subscription or in any way authorize said county court to make said order. Respondent denies that the county of Dallas, on or about the 5th day of August, 1869, for a good and valuable consideration, under or by virtue of any law of this State, or by any order of record of the county court of said county, did subscribe the sum of \$150,000 or any other sum to the capital stock of said railroad company. Denies that said railroad company is

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a corporation duly incorporated or organized under or by virtue of any act of the general assembly of this State. Denies that said county did, under or by virtue of any order of said court, at any time afterward, issue the bonds or coupons in the writ described. Denies that said bonds or coupons were afterward delivered by Dallas county to said railroad company. Respondent says that they have not sufficient knowledge or information to form a belief as to whether said bonds or any of them in the usual course of trade and exchange passed into the hands of the relator. Respondent avers, that said supposed order purporting to authorize the issue of the bonds and coupons of said county in payment of said stock, was upon this express condition precedent, viz: That said bonds shall not be issued and delivered, until such time as said railroad bed or grading shall be completed from Ft. Scott, in the state of Kansas, to the western line or boundary of the county of Dallas, ready to receive the cross-ties, or that said railroad-bed or grading shall be completed from the point where said road intersects the main line of the Southwestern branch of the Pacific Railroad to the eastern line or boundary of said county of Dallas ready to receive the cross-ties. But, as respondent avers, said condition precedent to the authority to issue said bonds, has never been complied with, said road-bed has never been completed, either from Ft. Scott to the Dallas county line, or from Pacific Railroad to the eastern line of said county; that said bonds were issued without authority, and without any order of said court, authorizing or permitting the same to be done, which fact the relator in this cause well knew, when he came into possession of said bonds and coupons.

And respondent further avers that said supposed order was, after its date and before any of said bonds were issued, revoked, rescinded and set aside, so that when said bonds were actually issued, there was no order taking stock in said railroad company on the records of said court, nor any order authorizing or permitting the issuing of said

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bonds or coupons. Respondent further answering, says that the writ of mandamus ought not to be made peremptory, because no judgment in favor of the relator has been rendered in any court against said county on said coupons. Wherefore respondent asks to be dismissed and the application to make said writ peremptory be refused.

4. That on the 17th day of April, 1873, the Metropolitan Bank, relator in said writ, filed in said circuit court the following reply: Now comes the said applicant, and for reply to matter contained in the return of said county court to the alternative writ issued herein, states that the subscription to the Laclede & Ft. Scott Railroad Company of \$150,000 and the issue of the bonds and coupons, as averred in the writ, were all made and done under and by virtue of law, and denies that it had any notice, whatever, of any irregularity or want of compliance with any condition upon the part of the county court or judges thereof in issuing said bonds before they came into its possession.

5. That on said last date the said cause was by said circuit court tried on the issues so joined, as aforesaid, at which it was stipulated by the parties that said bonds had in fact been issued in payment of a subscription to the capital stock of the Laclede & Ft. Scott Railroad Company, and that no proposition to subscribe had ever been submitted to the resident voters of said Dallas county, and that said subscriptions had not been voted for by a majority of the resident voters of said county. It was proved at the said trial, that the Metropolitan Bank was an innocent purchaser before maturity of said bonds and coupons. And on said facts so stipulated and proved, said circuit court gave judgment in favor of the respondent and against the relator, and refused to make the said alternative writ of mandamus peremptory, and refused to make the orders and decrees prayed for in said petition. Relator thereupon filed its motion for a new trial, which was overruled by said circuit court, and then filed its bill of exceptions, duly signed, after which relator sued out its writ of error from

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the Supreme Court of this State, whereby said cause was carried to said Supreme Court, where, on the record and bill of exceptions said cause was tried on error, and on the 29th day of November, 1881, the Supreme Court gave judgment of affirmance, finding, from said record and bill of exceptions, that before the subscription to the capital stock of the Laclede & Ft. Scott Railroad Company, in payment of which said bonds were issued, said subscription was not submitted to the resident voters of said county, as by law required, and holding for that reason that said bonds and the coupons thereto belonging were unauthorized and void, and of no binding force and effect against the plaintiff herein.

6. Plaintiff states that at the time of the institution of said suit, the Metropolitan Bank of St. Louis was a banking corporation, organized and existing under the laws of the State of Missouri, and doing business in the city of St. Louis, State of Missouri; that at that date and ever since Jacob S. Merrill, defendant herein was, has been and is president and chief officer of said bank; that in such capacity and with the knowledge of said bank he directed and caused said suit to be instituted and prosecuted to the final judgment aforesaid, in the Supreme Court; that after the judgment of the circuit court aforesaid, and while said cause was pending in the Supreme Court, to-wit: On the 4th day of September, 1873, the said Metropolitan Bank, by resolution of its board of directors, and with the consent of its stockholders, consolidated with and was merged into the Bank of St. Louis, a banking corporation organized and existing under the laws of the State of Missouri, of which latter corporation Jacob S. Merrill then was and still continues to be the president and chief officer; that in compliance with the terms of such consolidation and merger the Metropolitan Bank, by its said president, transferred and delivered the bonds and coupons aforesaid, to the said president of the Bank of St. Louis, for the use of said latter bank; that said Bank

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of St. Louis then had full knowledge of the judgment and pendency of the suit aforesaid, and that the validity of said bonds and coupons were involved therein; that on the 16th day of July, 1877, said Bank of St. Louis suspended business and went into liquidation, leaving said bonds and all the coupons originally attached thereto, except the first five thereof, in the custody and control of said Merrill, who still has and holds them; that said Bank of St. Louis now claims to own the same, and said Merrill claims the right to sell and dispose of the same; that said bonds and coupons are negotiable, being payable to bearer, all the bonds and most of the coupons not yet being due or payable; that disregarding the said opinion and judgment of the Supreme Court of Missouri, the circuit courts of the United States, for the districts of Missouri, hold other Dallas county bonds and coupons of the same issue and series to be valid and binding upon Dallas county, when in the hands of innocent purchasers or holders for value; that the defendants threaten, and as plaintiff believes, intend to transfer and sell said bonds and coupons, to an innocent purchaser, or citizen of some other state than Missouri, with the intent or design of having suit brought for collection of the same in the United States courts, against the plaintiff; that there are 570 interest coupons on said bonds, and unless said bonds and coupons are surrendered to plaintiff and cancelled and defendants be restrained from negotiating the same, plaintiff will be harassed for the next ten years with a multitude of vexatious and unjust lawsuits, whereby plaintiff will or might lose the protection and effect of said final judgment of said Supreme Court in its behalf, they, the defendants, well knowing said bonds and coupons have been adjudged void as hereinbefore alleged, whereby plaintiff will be injured and its right as well as the rights of such innocent purchaser or holder would be prejudiced.

Wherefore plaintiff asks a decree that the defendants be required to deliver up to the plaintiff the bonds herein-

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before particularly described, and the coupons belonging thereto, to be cancelled, and that the defendants be restrained and enjoined from transferring or delivering the same to any other party, and for such other and further relief as may be just and equitable.

To this petition the defendants demurred, assigning the following grounds: (1) That the petition does not state facts sufficient to constitute a cause of action. (2) It does not appear by the petition that either the title to the bonds mentioned in the petition or the right to a recovery upon them, was in issue in the cause, in which the Supreme Court rendered an opinion as stated in the petition. (3) It appears by the petition that the Supreme Court merely gave as an opinion its view of a question, not at issue in the cause, but admitted by stipulation to be precisely as the court in its opinion declared. (4) It does not appear by the petition in what manner plaintiff is liable to be injured by reason of defendants' holding said bonds, or that defendants are not responsible for any and all transactions they might have in reference to said bonds, with that portion of the public denominated by the petition as innocent purchasers. (5) It does not appear by the petition by what authority the plaintiff comes into court to sue in behalf of the innocent portion of the community. (6) It does not appear by the petition that plaintiff has not a complete remedy at law against the owner or holder of said bonds, or that it is in danger of losing such remedy. (7) It appears by the petition that the only issue in the cause made in the circuit court of Dallas county by the pleadings was, as to the right of the relators in that case to a mandamus on the county court to levy a tax to pay the coupons filed in said cause, and the judgment in that case can affect no other coupons or bonds. (8) The bonds which plaintiff prays for the surrender of, and which it is asked to cancel, were not in suit in the case the record whereof is set out by plaintiff, and cannot be affected by the judgment of the circuit court in said case. (9) The opinion or judgment

of the Supreme Court can reach no further than the affirmation or reversal of the judgment of the circuit court upon the case made by the record before it, and it sufficiently appears by the petition that the issue before the circuit court was as to the right of the relator in that case to a mandamus on the county court to levy a tax to pay certain coupons then and there filed, that the circuit court refused to make the writ of mandamus peremptory and dismissed the alternative writ, and the Supreme Court merely affirmed the action of the circuit court, and defendants submitted to the judgment of this court, that defendants are not liable to have the reasons of the Supreme Court given by it for its action, resolved into judgment in this court as prayed for by plaintiff, and defendants cannot be affected thereby. (10) It appears by the petition, that the defendant, the Bank of St. Louis, is the owner and holder of the bonds mentioned in the petition, and that said bank was not a party to the proceeding for a mandamus, and is unaffected by the judgment in that proceeding. (11) It does not appear by the petition that the defendant, Jacob S. Merrill, was a party to said proceeding or that he has any interest in the subject matter of this suit. (12) That whatever might be the effect of the judgment pleaded by plaintiff as an estoppel or *res adjudicata* as a defense to a suit on the bonds or coupons held by the Bank of St. Louis, it does not give plaintiff any right of action against these defendants to require the bonds and coupons which have never been in suit, to be surrendered and cancelled as prayed for by the petition. (13) That the present holder of said bonds took them, as appears by the petition, under the force and operation of decisions of the Supreme Court of the State of Missouri then and there unreversed, whereby a vote of the people of Dallas county was unnecessary to the validity of said bonds.

Dyer & Ellis for plaintiff in error.

If the bonds and coupons are void, as held by this court, and if this result has been solemnly adjudged between the parties to this action, then it is within the jurisdiction of a court of equity to require the defendants to deliver them to the plaintiff for cancellation, and also to restrain the defendants from transferring or negotiating them. The equitable remedy of surrender and cancellation does not depend for its existence upon the manifest and certain loss of legal defense, to the instrument in question. Where an instrument is absolutely void at law, though not so on its face, equity will order cancellation, notwithstanding there is a defense at law. Story Eq. Jur., (Redf. Ed.) §§ 698, 700. If the instrument may be used as a means of vexatious litigation, it should be cancelled. *Ib.*, 700. Equity will require the surrender and cancellation of an instrument void at law, where it may be made the ground of vexatious demands by the holder. Jeremy's Eq., (2 Am. Ed.) 499, 502. Even though there be a good defense at law, and the instrument be void, yet equity will compel a surrender. Willard's Eq., (1 Ed.) 306, 307; *Hamilton v. Cummings*, 1 John. Ch. 523. Where the invalidity of the contract will be a defense at law, *pari ratione*, if its illegal character be not apparent on the face of it, this will be a ground for cancellation in equity. Adams' Eq., (Sharswood's Ed.) p. 360; Bispham Eq., (2 Ed.) § 473. So even though Dallas county might successfully plead that the bonds and coupons were void, in the federal courts or elsewhere, yet equity will not, therefore, deny its aid.

There are 570 coupons attached to the fifteen bonds in suit, making 585 distinct causes of action, maturing at intervals during the next ten years. If Dallas county could defeat each one of these causes of action, yet the litigation would be vexatious and oppressive. *Cass Co. v. Green*, 66 Mo. 498. A court of equity "will also give its aid to pre-

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vent oppressive and interminable litigation or a multiplicity of suits, * * or against a constantly recurring grievance." *Parker v. Manf. Co.*, 2 Black 545; Mitf. Eq. Plead. by Jeremy, 144, 145; 1 Story Eq., §§ 86, 701; Bisph. Eq., (2 Ed.) § 474. Equity will not deny assistance unless the plaintiff's remedy is as perfect and complete at law as in equity. *Boyce v. Grundy*, 3 Pet. 209; *Insurance Co. v. Bailey*, 13 Wall. 616. Can it be held that our defense in the United States courts against an innocent holder of these bonds would be "as practical and efficient," as "perfect and complete" as our claim of *res adjudicata* is in this court?

In *State v. Holladay*, 72 Mo. 502, this court has decided that bonds circumstanced as these have sufficient value upon which to base a compromise. *A fortiori* they have sufficient value, to become, in a federal court, a cause of action which would be harassing and dangerous to this plaintiff, and against the probability and threat of which, a court of equity will protect us. Certainly a court of conscience ought not to furnish parties with pretexts, by which they may escape the effect of a final judgment against them. In any event, and from every view of the case, it would be unfair and inequitable to permit these defendants to take advantage of the negotiability of these bonds and coupons, and by negotiating them, to cut off a just defense, which, as to them, is conclusive. 1 Story's Eq., (Redf. Ed.) § 700; Will. Eq., (1 Ed.) 308; Hill Inj., (3 Ed.) 720, *et seq.*

Thomas C. Fletcher for defendants in error.

The plaintiff cannot be heard in a court of equity to invoke its interference with the Bank of St. Louis or with Merrill to prevent the disposal of the bonds, merely because the rights and remedies of citizens of the United States are alleged to be other than the rights and remedies of citizens of this State in the courts of the State. The reason assigned by the pleader for the interference of this

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court is conclusive of the inequity of the prayer of the petition. Defendant Merrill is a citizen of the United States. It is not averred to the contrary. His rights and privileges as such cannot be discriminated against by the judicial construction of any law in this State. Const. U. S., art. 4, § 2. It is admitted that the bank was an innocent purchaser for value. If there was any fraud in the issue of the bonds, the county was the guilty party. It is averred that the bonds may have some value in the hands of a non-resident of the State. Will a court of equity, under these circumstances, aid the county to wrest them from defendants, and thus consummate the fraud? Will this court assume that the United States courts will do an unlawful thing, and will it undertake to deprive a citizen of his property merely to prevent such property from hereafter becoming subject to the jurisdiction of the courts of the United States?

PER CURIAM.—It appears from the record in this case that the Metropolitan Bank was an innocent purchaser before maturity of the bonds and coupons, which the plaintiff asks to have delivered up and cancelled. Notwithstanding this fact appeared in the mandamus proceeding set out in the petition, this court affirmed the judgment of the circuit court refusing a peremptory writ of mandamus to compel the county of Dallas to levy a tax to pay the coupons alleged in that proceeding to be due and unpaid. It appears from the petition that the circuit court of the United States for the district of Missouri hold Dallas county bonds, of the same issue and series declared void by this court in the mandamus proceeding aforesaid, to be valid and binding upon Dallas county, when in the hands of innocent purchasers or holders for value. In the case of the *State ex rel. Stamper v. Holladay*, 72 Mo. 499, this court held that bonds thus circumstanced are not nullities in the hands of the holders thereof, and as the holders are declared by the United States courts to have property

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therein, we think it beyond the province of this court to undertake to destroy in the hands of citizens of the United States that which the courts of the United States declare to be property. We have exhausted our jurisdiction in declining to enforce such bonds as valid obligations, and do not think we can lawfully go to the extent we are now asked to go.

The judgment of the court of appeals will be affirmed. SHERWOOD, J., dissents.

THE STATE ex rel. PHILLIPS et al., Plaintiffs in Error, v. RUSH.

Pleading Execution of Bond. A petition alleged that the defendants "by their certain writing obligatory * * * sealed with their seals, became bound unto * * * in the sum of * * * for the just payment of which they bound themselves." *Held*, that it sufficiently averred the execution of the bond by defendants.

Error to Marion Circuit Court.—HON. JOHN T. REDD, Judge.

REVERSED.

H. J. Drummond, James L. Hart and Belch & Silver for plaintiffs in error.

McCabe, Anderson & Boulware for defendants in error.

HOUGH, C. J.—This is a suit on an executor's bond. The only allegation in the petition as to the execution of the bond, is that the defendants "by their certain writing obligatory, * * * sealed with their seals, became bound unto the State of Missouri in the penal sum of \$30,000, for the just payment of which they bound themselves, their heirs," etc. The circuit court sustained a demurrer to the petition for the reason that the foregoing allegation did not amount to an averment that the defend-

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ants, or either of them, executed the writing obligatory therein mentioned; and the plaintiff declining to amend, final judgment was rendered on said demurrer for the defendants. / The statement that the defendants became bound unto the State of Missouri in the sum of \$30,000 by their certain writing obligatory, standing alone, might be regarded as a conclusion of law, and, therefore, insufficient; but the accompanying allegation that the defendants bound themselves to pay said sum, is clearly the averment of an issuable fact. Taking the allegation as a whole, it is tantamount to an averment that the defendants by their certain writing obligatory, sealed with their seals, bound themselves to pay to the State of Missouri the sum of \$30,000, which we think is a sufficient averment of the execution of the bond by the defendants. Bliss on Code Plead., §§ 144, 210, 213.

The judgment will, therefore, be reversed and the cause remanded. The other judges concur.

WILLIAMS, *Appellant*, v. COURTNEY.

Dower. The legislature has no power to divest inchoate dower; and, in the case at bar, did not, by the special act, (Sess. Acts 1855, p. 614,) authorizing the husband's guardian to sell his real estate, assume to do so.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY, Judge.

REVERSED.

This was a proceeding for assignment of dower to appellant, her right to which was denied solely upon the ground that a sale by the guardian of her husband under a special act of the legislature, approved February 24th,

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1855, entitled "An act for the relief of John R. Williams, of Andrew," extinguished her right of dower.

Rea & Williams for appellants.

Majors & Campbell for respondents.

SHERWOOD, J.—The right of a married woman to dower in the land of her husband rests on as secure a foundation as does the fee of the husband in such land. From the moment the facts of marriage and seisin concur, the right of the wife in this regard becomes a title paramount to that of any person claiming under the husband by subsequent act. Co. Litt. 32 a. So that neither the alienation of the land by the husband, nor alienation resulting from proceedings *in invitum* against him, will invest the alienee with the title as against the wife's dower right; such right remains intact until relinquished in the manner prescribed by law. 1 Scribner on Dower, 577; *Grady v. McCorkle*, 57 Mo. 172. The act of the legislature authorizing the guardian of plaintiff's deceased husband to sell the land in question, does not profess to confer any authority on such guardian to dispose of plaintiff's dower right, and if it did, it would violate that constitutional provision which forbids that any one be deprived of property "without due process of law," and would be a legislative attempt to take the property of one person and bestow it upon another. 2 Scribner on Dower, pp. 21, 22, and cases cited.

Therefore, judgment reversed and cause remanded. All concur.

The State *ex rel.* Wakefield v. Richardson.

THE STATE *ex rel.* WAKEFIELD V. RICHARDSON *et al.*, Plaintiffs
in Error.

1. **Back Taxes: COLLECTOR'S CERTIFICATE, AS EVIDENCE.** Upon the trial of an action for the recovery of back taxes, a tax-bill certified to by the relator, as collector, was given in evidence, without objection. *Held*, that the judgment in his favor would not be set aside on the ground that there was no evidence that relator was the collector. SHERWOOD, J., dissenting.
2. **Motion for New Trial: EVIDENCE: INSTRUCTIONS.** This court will not inquire into the action of the trial court in excluding evidence or refusing instructions, unless complaint be made of such action in the motion for new trial.

Error to Jasper Circuit Court.—HON. JOSEPH CRAVENS, Judge.

AFFIRMED.

Jas. M. Richardson and F. P. Wright for plaintiffs in error.

Harding & Buller for defendant in error.

NORTON, J.—This suit was instituted in the circuit court of Jasper county, at the relation of Thomas Wakefield, collector for said county, for the recovery of back taxes for the years 1874, 1875 and 1876, assessed upon lot 494 in the city of Carthage, aggregating the sum of \$31. The petition is in usual form, and avers that said Wakefield is the collector of said county, and that the taxes for said years remain due and unpaid, and asks judgment for the amount with ten per cent interest, to be enforced as a lien upon said lot. It is also averred that said Wakefield had agreed in writing with the attorneys bringing said suit, which had been approved by the county court, that they were to receive ten per cent as their fee on amount of taxes collected, to be taxed as costs. It is also averred that defendant Alyen is the owner of said real estate, and that defendant Richardson claimed some interest therein,

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the extent of which was unknown to plaintiff. The answer was a general denial.

The cause was tried and the issues submitted to a jury and a verdict returned for plaintiff, upon which judgment was rendered according to the prayer of the petition, from which defendants have prosecuted a writ of error to this court, and the first point relied upon for a reversal of the judgment is, that there was no evidence that Wakefield was the collector of Jasper county. This point must be ruled against the defendants for the reason that plaintiff introduced in evidence, without objection from defendants, a back-tax bill issued and certified to on the 28th day of May, 1878, by said Wakefield, as collector of Jasper county, showing the amount of taxes sued for. If defendants intended to controvert the authority of said Wakefield, as collector, when this paper was offered in evidence, showing that Wakefield was in fact acting as collector, an objection should then have been interposed, and their failure to do so is fatal to the objection made by counsel. If, on the trial, evidence had been offered and received without objection of verbal declarations made by Wakefield that he was collector of Jasper county and was so acting, such declarations would at the least be some evidence of the fact. The certified copy of the tax-bill received in evidence without objection, was but the written declaration of Wakefield of the fact of his being collector, and that he was acting in that capacity.

The second point relied upon is the refusal of the court to allow defendant to read in evidence certain tax-books and assessors' books to show that the lot in question had been wrongfully assessed in the name of one Brintling, as owner. This point must be ruled against defendants because this action of the court is not set forth as a ground for new trial in the motion for a new trial.

It is also objected that the court erred in refusing an instruction to the effect that the jury should find for defendants as to the attorney's fee of ten per cent on the

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amount of taxes collected, as claimed in the petition. This objection cannot be considered because no complaint as to the action of the court in giving or refusing instructions, is made in the motion for new trial. We perceive no error in the record authorizing an interference with the judgment, and it is hereby affirmed with the concurrence of all the judges, except Judge SHERWOOD.

SHERWOOD, J.—I do not concur on the point in regard to the collector. The answer was a general denial, controverting every allegation of the petition. In such circumstances it devolved on the party holding the affirmative to establish the authority of the collector, either that he was *de jure*, or else *de facto* collector. The mere tax-bill, in my opinion, did not have the effect of showing that Wakefield was acting as collector.

CHUBBUCK V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

1. **Railroads: LIABILITY FOR KILLING STOCK: COMPLAINT.** In an action against a railroad company for killing stock, founded on the 43rd section of the Railroad Law, (R. S. 1879, § 809,) it is sufficient that the complaint allege the requirements of the statute in respect to the maintenance of fences and cattle-guards, the negligent failure to maintain the same, and that the killing was occasioned by such failure: it is not necessary to allege that the defects complained of were permitted to remain longer than was necessary, by the exercise of reasonable diligence, to discover and repair them.
2. **Instructions.** It is error to submit a question to the jury in relation to which there is no evidence.
3. ———. An instruction is erroneous which directs the jury to consider positive and affirmative evidence in preference to that which is negative and circumstantial.

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Appeal from Caldwell Circuit Court.—HON. E. J. BROADDUS,
Judge.

REVERSED.

Geo. W. Easley for appellant.

Johnson & Dilley for respondent.

HOUGH, C. J.—This action was begun before a justice of the peace to recover damages for the killing of plaintiff's steer on July 8th, 1879, which killing was alleged to have been occasioned by the failure of the defendant to maintain good and substantial fences and cattle-guards, as required by section 43 of the Railroad Corporation Law. After alleging generally the failure of the defendant to maintain fences and cattle-guards, the negligence of the defendant in that regard, it more particularly alleged as follows: "That the defects in said fences and cattle-guards had existed for a long time prior to the 8th day of July, 1879, and the defendant, its agents and servants had knowledge of said defects." The testimony was conflicting as to whether the steer was struck on the road-crossing or inside the cattle-guards. As to the condition of the fences, one witness testified that "the fence had been down all summer," and that the section boss knew it. It appears, also, that the cattle-guards were out of order, but it does not appear how long they had been so, or that the agents of the defendant knew of their defective condition.

At the instance of the plaintiff, the court instructed the jury that if the steer got upon defendant's track, and was killed, at a point where the track passed along, through or adjoining inclosed or cultivated fields, by reason of the failure and neglect of defendant to maintain suitable and sufficient cattle-guards, they should find for the plaintiff.

At the instance of the defendant, the jury were instructed that, if plaintiff's steer was struck and injured

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while on the road-crossing, they would find for the defendant. There was a verdict and judgment for plaintiff.

It is contended by the defendant that the extract from the complaint above quoted contains no sufficient allegation of negligence in that it fails to state that the alleged defects had been permitted to remain longer than was necessary, by the exercise of reasonable diligence, to discover and repair them. It is the doctrine of this court that a general allegation of negligence is sufficient; that is, it is sufficient to aver that the defendant negligently performed or negligently omitted to perform some act, the performance or non-performance of which caused the injury complained of. *Mack v. St Louis, K. C. & N. R. R. Co.*, ante, p. 232. The complaint in this case, apart from the extract above quoted, alleges the failure of the defendant to maintain fences and cattle-guards at the places and in the manner required by law, setting forth the requirements of the statute. Now, to go further, and allege that the fences had been down, or the cattle-guards out of repair for a certain period of time, and that the defendant had notice thereof, and that a reasonable time thereafter had elapsed within which defendant might have repaired the same but omitted to do so, would simply be pleading the evidence of the negligent failure to maintain the fences and cattle-guards, and is, therefore, not required.

It was shown that the defective condition of the fences was known to the defendant's agents for some time, but it does not appear how long the cattle-guards were out of repair, or that the agents of the defendant knew of their defective condition. As the plaintiff, in his instruction given at his instance, based his right of recovery upon the defect in the cattle-guard, and not on the defect in the fence, the plaintiff should have shown that the defendant had notice of the defect, or that a reasonable time had elapsed in which, by the exercise of ordinary diligence, it might have discovered and repaired the same before the

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injury was inflicted. *Clardy v. St. Louis, I. M. & S. R. R. Co.*, 73 Mo. 576. There being no testimony showing a negligent failure to maintain the cattle-guards, which it appears the defendant had once constructed, the court erred in submitting that question to the jury.

As the case must be re-tried, it will be proper to observe that the four instructions asked by the defendant and 2. — refused by the court, were properly refused. Three of them have been abandoned in this court, and the remaining one, which tells the jury they "should consider positive and affirmative evidence in preference to negative and circumstantial evidence," is inapplicable to the facts in evidence, and is erroneous in itself. Circumstantial evidence is often more convincing than positive testimony.

The judgment will be reversed and the cause remanded. The other judges concur.

THE EXCHANGE BANK, *Appellant*, v. TRACY.

1. **Surviving Partner : POWER TO BIND ESTATE OF DECEASED.** A surviving partner has no power to bind the estate of the deceased partner by new contracts, unless expressly authorized so to do by the deceased either by will or contract.
2. **In the present case there was no such authority.**
3. — : **CONTINUATION OF OLD FIRM.** A clause in a will providing for the continuation of a firm of which the testator was a member, does not, of itself, continue the old firm or create a new one. To give it effect, the surviving partner must assent and continue the business with that understanding and intention.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

B. R. Dysart for appellant.

Tracy, Jr., had authority to continue the business, and bind the estate of the deceased. *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville*, 2 How. 560; *Edwards v. Thomas*, 66 Mo. 468; *Alexander v. Lewis*, 47 Texas 481; Story Part., §§ 195, 196, 201. Judgment should have been rendered against the administrator, leviable out of the partnership estate. *Asbury v. McIntosh*, 20 Mo. 279.

Jas. L. Berry and *Jas. M. Roberts* for respondent.

The authority to continue must be express. Story Part., (4 Ed.) § 243; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville*, 2 How. 560; *Kirkman v. Booth*, 11 Beav. 273; 3 Redfield Wills, (2 Ed.) 257; *Price v. Mathews*, 14 La. An. 11; *Wightman v. Townroe*, 2 Maule & S. 413; *Webster v. Webster*, 3 Swanst. 490; *Washburn v. Goodman*, 17 Pick. 519. No funds in the hands of administrator, no judgment against him. *Roosevelt v. McDowell*, 1 Kelly (Ga.) 489.

MARTIN, C.—The controlling question in this case is, whether the estate of a deceased person can be subjected to the payment of a note executed and delivered after his death by his surviving partner in the name of the old firm.

It seems that B. N. Tracy, Sr., on the 1st day of January, 1872, entered into a copartnership with his son, B. N. Tracy, Jr., under the firm name and style of "B. N. Tracy & Son," for the purpose of carrying on a banking and brokerage business in the City of Macon. In the articles of agreement it was provided that the partnership might be terminated at any time by either party giving the other notice to that effect, and that upon dissolution the capital put in by each party was to be returned to him, and the remaining assets were to be equally divided. The profits were to be equally divided. Under this agreement the business was conducted till November, 1873, at which

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time B. N. Tracy, Sr., died, leaving a will which was subscribed and attested on the 10th day of November, 1873.

On the 20th day of November, 1873, B. N. Tracy, Jr., using the old firm name, published a notice in the Macon City papers addressed to the patrons of the bank to the effect that: "The decease of the senior member of our house will in no way affect its resources, arrangements having been made to keep its capital intact. The well known conservative policy of our house, with its ample capital employed, will, we trust, continue to be duly appreciated by you. Soliciting your continued patronage, we are your obedient servants." Other notices of similar import were made to the public, and circulated among the patrons of the bank.

The will was probated on the 2nd day of December, 1873, at which date B. N. Tracy, Jr., became executor of B. N. Tracy, Sr. At the same time, as surviving partner, he became administrator of the partnership estate of "B. N. Tracy & Son." After various specific devises the testator provided in his will as follows: Item seventh. "My executor is hereby directed and required to pay all my just debts and funeral expenses, the following debts in the following manner, to-wit: One note for \$2,000, payable to Benj. N. Tracy, Jr., the 1st day of January, 1874, and one for \$1,000, payable to B. N. Tracy & Son, on the 1st day of January, 1874, I desire shall be paid out of my current account with the bank of B. N. Tracy & Son. One note to B. N. Tracy, Jr., for \$3,000, due April 1st, 1874, to be paid when due by transfer of that much of my stock in said bank to said B. N. Tracy, Jr., and one for \$3,000, payable to B. N. Tracy, Jr., the 1st day of July, 1874, to be paid out of my current account with said bank, and if no current account at that time, to be paid out of such moneys belonging to my estate as may then be on hand. All devises and bequests herein made being subject to my debts. Item eighth. In the year of our Lord 1880, I desire and it is my wish that all the rest and residue of my estate be

divided among my wife and children, as follows: To my daughter Bettie, \$2,500; to my executor, \$3,000, to hold for the use and benefit of my wife while she shall live, the interest whereof to be paid to her annually; and the balance of my estate, if any, equally between my four sons and my daughter Bettie."

On the 15th day of January, 1874, B. N. Tracy, Jr., filed in the probate court two inventories, one as executor of the estate of B. N. Tracy, Sr., which does not contain any allusion to the partnership assets, except mention of a debt due from "B. N. Tracy & Son" in the sum of \$364.87; the other as surviving partner of the firm of B. N. Tracy & Son, showing its net assets to be of the par value of \$36,653.14.

The banking business was conducted by B. N. Tracy, Jr., under the old firm name. It is claimed by plaintiff that this was a continuation of the old firm, with the executor as successor of B. N. Tracy, Sr.; while the defendants insist that the business, after the decease of B. N. Tracy, Sr., was conducted by his son on his individual responsibility, and that he had no authority to bind either the general or partnership estate of the deceased, for any debt contracted after the decease.

In January, 1875, B. N. Tracy, Jr., filed in the probate court a statement of the condition of the firm of "B. N. Tracy & Son," signing it as surviving partner. At the same time he also filed, as executor of B. N. Tracy, Sr., a report or annual settlement of the estate, in which, it appears that he has charged himself with what is denominated "dividends" from "B. N. Tracy & Son," amounting to \$1,497.20, for the years 1873 and 1874.

The note sued on in this case was dated August, 1875, payable sixty days after date to the plaintiff, in the sum of \$9,000, with interest at ten per cent after maturity, signed "B. N. Tracy & Son." It contains indorsements of credits in August and September, 1876, in the aggregate of \$6,000, leaving a balance of \$3,000 with interest.

About the 5th day of September, 1876, B. N. Tracy, Jr., failed in the business conducted by him to that time, and left the State. On the 18th day of September, his letters and authority as executor of B. N. Tracy, Sr., and as administrator of the partnership of "B. N. Tracy & Son," were revoked, and Philip Trammel, a defendant herein, was appointed administrator *de bonis non*, with the will annexed, of B. N. Tracy, Sr. He was also appointed to take charge of and administer the partnership estate of B. N. Tracy & Son. The new administrator testifies that no assets of either the individual estate of B. N. Tracy, Sr., or of the partnership estate of B. N. Tracy & Son have ever come into his hands. There was evidence tending to show that the widow and heirs of B. N. Tracy, Sr., always regarded him as conducting the business on his individual responsibility.

The court, trying the case without jury, refused to give at the instance of plaintiff the following declarations of law:

1. By the terms of said will the testator's capital stock in the Banking House of B. N. Tracy & Son, and its proceeds, were left remaining in the company, and the executor was authorized to continue said banking business till the year 1880.

2. If the executor did, in fact, carry on the said banking business after the death of the testator, using the capital stock of the testator as a part of the capital of said bank until after the note sued on was given, and said note was given in the due course of said banking business, then the finding should be for the plaintiff against the defendant, B. N. Tracy, Jr., and against the defendant, Philip Trammel, administrator *de bonis non*, to be satisfied out of the property and effects of the firm of B. N. Tracy & Son, in his hands for the balance due on said note.

3. Upon the facts as found by the court, the plaintiff is entitled to recover and have judgment on said note for the balance due thereon, against the defendant Trammel,

as administrator *de bonis non*, to be satisfied out of the property and effects of the firm of B. N. Tracy & Son.

The court gave the following declaration of law asked by defendants:

2. That in order to bind the individual estate of B. N. Tracy, Sr., deceased, for the debts contracted by his executor in the banking business, the authority so to bind it must clearly and expressly appear from the testator's will, and unless such authority so appears, the finding must be for the defendants named in the first instruction herein.

And thereupon judgment was rendered in favor of all the defendants, except B. N. Tracy, Jr., who made default and suffered judgment in the full amount. The plaintiff brings the case up on appeal.

I. From the petition and declarations of law asked by plaintiff, it is apparent that the object of this suit was to obtain a judgment against the personal representative of B. N. Tracy, Sr., which should be leviable out of his general estate, or his interest in the partnership estate, on account of a debt incurred in the old firm name nearly two years after his death; thus imposing on his estate an obligation contracted by his representative after his death in like manner as if it had been incurred by him while living.

Death operates as a dissolution of a partnership. The law has never been otherwise. The right of a surviving partner to bind it by contracting further obligations ceases at once. The estate of a deceased person becomes liable at once for the obligations left by him undischarged, and his personal representatives have no power to impose upon it any new burdens. Notwithstanding this, it may be said that a well settled exception to this rule is conceded, when the deceased person either in his will or in his contracts has clearly ordered otherwise, and has empowered his executor to bind his assets, either general or special, with the burden of new obligations to be incurred after his death. Story on Part., (4 Ed.) p. 538; Parsons Part., 438; 3 Redfield Wills,

(2 Ed.) p. 257, § 8; *Edwards v. Thomas*, 66 Mo. 468; *Alexander v. Lewis*, 47 Texas 481; *Scholefield v. Eichelberger*, 7 Pet. 586; *Burwell v. Mandeville*, 2 How. 560; *Kirkman v. Booth*, 11 Beav. 273. In admitting the exceptions, it will be found that the text writers and courts have very generally declined to recognize it in the absence of an express or positive provision of the deceased to that effect. In the language of Redfield, in his work on wills: "It seems scarcely needful to say here that the executor can have no justification for continuing the business of a partnership unless by the most unequivocal direction of the will, and then only where the estate is clearly solvent." 3 Redfield Wills, (2 Ed.) 257. In speaking of the character of the necessary directions or authority, the courts are in the habit of using the terms "express," "positive," "unequivocal" and "unambiguous."

I do not know that these expletives can add anything to the simple rule which denies the exception in the absence of some satisfactory provision or direction to the contrary. They seem to indicate the reluctance with which the courts permit any business to be conducted in the name of a deceased person with the funds of the estate; and this reluctance is very natural. It is contrary to the natural order of events, that a man's business should be conducted in his name after his death by the executor or administrator subject to the hazards and risks imposed upon it by them. Provisions to that effect are opposed to the whole spirit and scheme of our administration law, which contemplates that estates of the deceased should be settled within two years, and the assets distributed under the laws governing the descent and distribution of estates. Again, the carrying on of the business of a partnership after the decease of one of the partners, in obedience to a direction or contract of the deceased to that effect, is not in its true nature a continuation of the old partnership, although it is thus inaccurately termed. It is necessarily the creation of a new partnership; (*Parsons on Part.*, 439,) and for that

reason ought not to exist in the absence of satisfactory proof of a direction of the deceased to that effect. The fact that the deceased may have contemplated the so-called continuation of the firm after his death as before, will not authorize the executor to continue the business in the absence of a direct provision to that effect. *Kirkman v. Booth*, 11 Beav. 273.

II. In this case there was no provision in the articles of partnership against dissolution or for continuation of the business. There was nothing in the nature of the business requiring a continuation, as sometimes happens when a firm is suddenly stopped in the middle or near the conclusion of some great enterprise. The contract provided for a dissolution on mere notice. There is no provision in the will directing such an important matter as the so-called continuation of the banking business till 1880. In my judgment the seventh and eighth clauses of the will do not constitute such a direction or authority. The eighth clause makes no mention of the partnership; it affects to set a day for a division of the rest and residue of his estate. The seventh clause purports only to direct the ways and means of paying some \$9,000 of notes evidently connected in some way with the partnership. He directs that three of these notes, amounting to \$6,000, be paid out of his current account in the bank, and the fourth one for \$3,000, by transfer of so much stock in the bank. Provisions which relate to a method or mode of administration, are not always regarded as absolute or exclusive of all other means and ways which may recommend themselves to the executor for the best interests of the estate. I do not think the direction to pay some of these notes out of his "current account" in the bank and the other by a transfer of so much of his "stock" or capital in the bank, is equivalent to an order on the executor to continue the business of the firm on account of the deceased, as if he was living. He probably contemplated that his capital would be retained by the new firm, and that something in the way of

interest or profits would be placed to his account for the use of the capital. It certainly does not reach the sufficiency of an order or authority to continue the old business on account of the estate as if he were living.

III. A clause in the will providing for the so-called continuation of the firm does not, of itself, continue the old or create a new firm. The surviving partner must assent to it, and continue the business with that understanding and intention.

Now, it seems to me the facts of this case fail to show satisfactorily that B. N. Tracy, Jr., regarded the new firm as composed of any one but himself, in his individual capacity using the capital and money of the old firm. His notice to the patrons of the bank, wherein he speaks of "arrangement having been made to keep the capital intact," would seem to imply that he intended to conduct the business for himself under the old firm name, and that he had made arrangements to retain the capital in the business. He took charge of the whole partnership estate as surviving partner, and carried it into the probate court as such. This act naturally excludes the idea of conducting the business on the responsibility of any one else. His accounts as surviving partner seem to indicate that he had the approval of the probate court for continuing the business, but only on his own responsibility. The credit of dividends which he takes in his account as executor, shows that he accepted something from the partnership estate for the use of the capital there. The law requires an executor to charge himself with the interest or profits received by him on funds of the estate, although used in unauthorized adventures. He should bear the losses and return the profits to the estate.

The distributees of the estate do not seem to have regarded the executor as conducting the business in any other way than on his individual responsibility, although having the use of the funds of the estate.

For these reasons, I think the evidence fails to disclose

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any authority to the executor from the deceased to burden either his general or partnership estate, with new obligations like the one sued on, and that the action of the court in refusing and giving instructions, and in rendering the judgment appealed from is correct and proper; accordingly the judgment is affirmed. PHILIPS, C., concurs; WINSLOW, C., absent.

HENRY, J., took no part in this case.

DILLON, *Appellant*, v. BOWLES.

Infant: NOT LIABLE EX ARQUO ET BONO FOR SERVICES RENDERED. All the adult heirs at law to a tract of land affected by a will, united in employing attorneys to prosecute a suit to set the will aside, agreeing that in case of success, as compensation for their services, the attorneys should receive one-half of the land. Through the exertions of the attorneys the will was set aside. *Held*, that a minor heir, although benefited by the result equally with the others, was not bound either at law or in equity to contribute to the payment of the fee.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Daniel Dillon for appellant.

The adult heirs could do no act to assert or protect the title to their interest in the land, without giving the minor the benefit. In fact it may be said there was a duty imposed on them to do what was necessary to protect the common interest. *Tisdale v. Tisdale*, 2 Sneed 599; *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Weaver v. Wille*, 25 Pa. St. 272; *Lloyd v. Lynch*, 28 Pa. St. 423; *Rothwell v. Dewees*, 2 Black 618. It being the duty of every one of the co-heirs to assert and protect the common title, it follows that

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it was incumbent on each one to contribute his share to the reasonable expenses necessarily incurred. Freeman on Co-tenancy and Partition, §§ 175, 263, 278, 322; *New Orleans v. Baltimore*, 15 La. An. 625; *Gage v. Melholland*, 16 Grant (Canada) 145; *Haven v. Muhlgarten*, 19 Ill. 91; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Hitchcock v. Skinner*, 1 Hoffman Ch. 27; *Gregg v. Patterson*, 9 W. & S. 208, 209; *Desch's Appeal*, 57 Pa. St. 472; *McDearman v. McClure*, 31 Ark. 559; *Denman v. Prince*, 40 Barb. 213, 217; *Titsworth v. Stout*, 49 Ill. 78; *Ill. L. & L. Co. v. Bonner*, 75 Ill. 329; *Kennedy v. Covington*, 17 B. Mon. 584, 585; *Oliver v. Montgomery*, 42 Iowa 36; *Israel v. Israel*, 30 Md. 127, 128; *Peyton v. Smith*, 2 Dev. & Batt. Eq. 349; *Sanborn v. Braley*, 47 Vt. 170; *Peck v. Sherwood*, 56 N. Y. 615; *Watkins v. Eaton*, 30 Me. 534, 535; *Sohier v. Eldridge*, 103 Mass. 351; *Hibbard v. Cooke*, 1 Sim. & Stu. 552; *Dent v. Dent*, 30 Beav. 369, 370; *Harrison v. Harrison*, 56 Miss. 174; *Sheperd v. McIntire*, 5 Dana (Ky.) 574. Even when a tenant in common cannot maintain an action against his co-tenant for contribution to the necessary expense of repairing or preserving the common property, the tenant who has borne such expense has an equitable lien and claim against the interest of his co-tenant in the common property for his proportionate part of such expense, and a court of equity will enforce this claim against the property, and especially in a proceeding for partition of the common property. Freeman on Co-tenancy and Par., § 263; 2 Story Eq., §§ 1234 to 1238; *Stephens v. Ells*, 65 Mo. 461, 462; *Titsworth v. Stout*, 49 Ill. 78; *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514; *Drenen v. Walker*, 21 Ark. 539; *McDearman v. McClure*, 31 Ark. 562; *Wilton v. Tazewell*, 86 Ill. 29. Even when a tenant in common has expended money, not in preserving the common property or in maintaining the common title thereto, but in making improvements on it, such expenditures are taken into account in a proceeding for partition, and the tenant who made them is re-imbursed out of the common property. *Hall v. Paddock*, 21 N. J.

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Eq. 311; *Martindale v. Alexander*, 26 Ind. 104; *Stafford v. Nutt*, 35 Ind. 93.

By claiming as heir of Mrs. Sipp, Harvey takes the benefit of the proceeding which resulted in setting aside the will. This he cannot do except *cum onere*. *Wilton v. Tazewell*, 86 Ill. 29; *Drenen v. Walker*, 21 Ark. 553; *Williams v. Gray*, 3 Me. 214. The right to contribution does not rest on contract, but on the general principles of equity and justice. *Bispham's Eq.*, §§ 27, 328; *Freeman on Cotenancy and Par.*, § 322; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Fletcher v. Grover*, 11 N. H. 372; *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 221; *Deering v. Earl of Winchelsea*, 1 Cox 318; 1 *Lead. Cases in Eq.*, mar. p. 31; *Van Petten v. Richardson*, 68 Mo. 379. This being so, infancy is no defense that can be invoked by said minor Harvey to this claim for contribution. It is not only competent, but it is eminently proper to have this question of contribution to the expenses of that suit to have said will set aside, adjusted in this partition proceeding. *Spitts v. Wells*, 18 Mo. 468; *Welch v. Anderson*, 28 Mo. 293; *Reinhardt v. Wendekt*, 40 Mo. 577; *Reed v. Robertson*, 45 Mo. 580; *Bradshaw v. Yates*, 67 Mo. 233; *Hines v. Munnerlin*, 57 Ga. 35; *Harrison v. Harrison*, 56 Miss. 194; *Wilton v. Tazewell*, 86 Ill. 29.

E. P. Lindley for respondent.

The plaintiff must base his claim either on an express promise by the infant or some one authorized to make it for him, or an implied promise, or on the equitable doctrine of contribution. As to express promise, there is no pretense that any was made, unless it be so intended from the allegation that the minor was represented by his father in the suit for contesting the will; but it is well settled that the father's duties relate to the person and not to the estate of the child, in regard to which he has no greater rights than a stranger. *Eyre v. Countess of Shaftsbury*, 2 *Lead. Cases Eq.* (4 Am. Ed.) pt. 2, p. 1487, and cases cited;

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McCarty v. Rountree, 19 Mo. 345. There is no implied promise. The law never raises an implied promise by an infant except for necessities. Necessaries, according to Coke, are food, raiment and education. They are such things as apply to the person and not to the estate. The guardian cannot bind his ward for repairs to his estate. *Thatcher v. Dinsmore*, 6 Mass. 301; *Hicks v. Chapman*, 10 Allen 564; *Simmons v. Almy*, 100 Mass. 240; *Phelps v. Worcester*, 11 N. H. 51; *Tupper v. Caldwell*, 12 Met. 559. No liability can be founded on the doctrine of equitable contribution because there was no necessity, so far as the minor's interest was concerned, to expend any money or incur any obligation. Until the obligation was created by the contract of the adult heirs with the attorneys, none existed. So far as the minor's interests were concerned, it was time enough to take steps to set aside the will after he came of age, when he could make his own bargain. But even if the minor was bound to contribute, his liability could not be enforced in this action, since the liability would be to pay in money, not in land, and the demand would be equitable in its nature; while the present suit is for the partition of land and is a proceeding at law. The contract of the adult heirs is not binding on the minor. *Putnam v. Ritchie*, 6 Paige 390; *Cox v. Storts*, 14 Bush 502; s. c., 8 Cent. L. J. 216; *Bicknell v. Bicknell*, 111 Mass. 265; Neither is their deed. *Murray v. Haverly*, 70 Ill. 318; *Marshall v. Trumbull*, 28 Conn. 183; *Hutchinson v. Chase*, 39 Me. 513; 4 Kent Com., p. 368.

RAY, J.—This was a petition, in the St. Louis circuit court, for the partition of certain real estate therein specified, in which the plaintiff claimed that (by reason of certain facts and allegations therein stated) he was the owner and entitled to an undivided eleven-twelfths of said real estate; and that the defendant, Harvey, who was a minor, was the owner and entitled to the remaining one-twelfth thereof, and asked for judgment of partition accordingly.

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On motion of defendant Harvey, by his guardian *ad litem*, certain specified portions of the petition were, by the court, stricken out, as irrelevant and insufficient, and plaintiff duly excepted thereto. The defendant Harvey, by his said guardian, thereupon filed his answer denying that plaintiff was the owner or entitled to an undivided eleven-twelfths; and averring that he was himself the owner and entitled to an undivided one-sixth of said land, and asking for a judgment of partition accordingly.

On the trial the plaintiff offered to prove the facts stated in that part of the petition stricken out, but the court excluded it as irrelevant and immaterial, and the plaintiff excepted. Thereupon, the court found for the defendant Harvey, and gave judgment accordingly. From this judgment the plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed; from which affirmance the plaintiff appeals to this court. The case is reported in 8 Mo. App. 419, where the facts of the case, the briefs of counsel, the points and authorities, as well as the opinion of the court of appeals, fully appear, to which reference is here had.

That opinion is as follows: "Hayden, J., delivered the opinion of the court: The present question turns on the propriety of the action of the court below in striking out certain parts of the petition, and excluding evidence corresponding to those facts, upon the trial. One Harvey, a minor, was a tenant in common with the defendant Caleb Bowles and four others, of land, of which partition is asked, each party having been owner of a sixth part, and heir of Elizabeth Sipp, deceased. The deceased had made a will, by which she devised the land to one Sullens.

This petition for partition alleges that the six heirs, defendants here, had by deeds of warranty conveyed their interest to the plaintiff, except that the minor, Harvey, had not conveyed the interest which he owned; that these heirs, except the minor, acting for all the heirs, employed counsel to bring suit to annul the will, and none of them

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having money, agreed with certain attorneys that if the proceedings to set aside the will should be successful, the heirs would convey to their counsel an undivided half of the land in payment of their services, an agreement which it is alleged was fair and reasonable on the facts. Suit was accordingly commenced in the name of all the heirs, Harvey, the minor, appearing by his father and guardian, and after much litigation the will was set aside. In pursuance of the agreement, one-half of the real estate was conveyed to the counsel, all except the minor joining in the deed, in full payment for their services in having the will set aside. The plaintiff claimed that the agreement was made and proceedings prosecuted for the benefit of all the heirs, and that the share of the minor must contribute one-half of his sixth, being his proportion; and upon this basis, allowing one-twelfth part to the minor and the other eleven-twelfths to the plaintiff, the latter asked partition.

The motion to strike out parts of the petition and the offer of evidence raised the questions whether the minor can be bound in the present proceeding upon the basis of the agreement, or his land subjected to contribution for a proportionate share of the agreed price of the litigation. The court below decided against the plaintiff upon these points, and decreed that partition be made upon the basis that plaintiff owned five-sixths and the minor one-sixth of the land. The plaintiff appealed.

It is unnecessary to argue the question here involved at length, as it is clear the court below was correct in its decision. The infant cannot be held liable on the basis of the special contract, and it is not claimed he made it. It is said the infant is liable *ex aequo et bono*. This is a vague phrase used generally in reference to the action for money had and received, and which has no application here. If so liable, for what would the infant be held? Not certainly upon an agreement to convey one-twelfth of this land; but it is upon this agreement, or, what is the same, on the basis of the obligation of it, that the plaintiff's position rests.

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Not only this, but the court is asked to proceed on the theory that specific performance has been accomplished, and that the minor stands as they do who have conveyed to the plaintiff; and this is assumed, though no separate cause of action is stated in the petition. But, if liable at all, the infant would be liable for a money payment, and the reasonableness of the sum would be an issue to be tried by a jury. There is, however, no legal liability. The attorneys were bound to know that they could not hold the infant to any implied obligation to pay for fees, and in view of this they made their contract. Equity follows the law and will not violate its policy, making infants liable where the law shields them. If at the request of the guardian of this infant a person had paid money to the attorneys for these fees, in order to preserve the land to the infant, it would have been a voluntary payment, and not recoverable of the infant. *Bicknell v. Bicknell*, 111 Mass. 265; *Tupper v. Cadwell*, 12 Met. 559; *Winsor v. Savage*, 9 Met. 346. If any right of contribution existed the plaintiff could not enforce it. No obligation arose in his favor, who is merely the grantee by deeds of warranty of the interests of the other five heirs in the lands, and does not claim to be otherwise connected with the minor. The judgment is affirmed. Judge Bakewell concurs; Judge Lewis is absent."

We have given this opinion, the points and authorities as well as the reasoning and conclusions of the court, a careful examination and consideration, and believe it to contain a just and fair statement of the facts and law of the case and, therefore, concur therein. We have also examined and considered the briefs of counsel, in this court, in which the whole question is ably and elaborately re-examined and re-argued, but after patient examination, we find no sufficient reason to change our views or depart from the conclusions so well and fully expressed in the foregoing opinion of the court of appeals.

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For these reasons the judgment of the St. Louis court of appeals, affirming that of the St. Louis circuit court, is affirmed. All concur.

THE STATE. *Appellant*, v. RUBEY.

1. **County and Township Funds:** ACTION BY THE STATE TO RECOVER. Under the laws now in force, county funds are the property of the county and not of the State, and the State has no right to sue for their recovery, except in actions brought to the use of the county on bonds of officers, which are by law required to be given to the State to the use of the county. Except in such cases, the suit should be in the name of the county. Where township organization is in force, the same rules apply to township funds.
2. **State Funds:** ACTION FOR. The State cannot maintain an action for her own funds until default has been made in paying the same into the State treasury.
3. **Public Funds Deposited in Bank.** The State cannot maintain an action against a bank in which the county treasurer has deposited public money, except by way of garnishment on execution against the treasurer, or perhaps, where there has been fraudulent collusion between the bank and the treasurer, and he and his sureties are insolvent, by a proceeding in equity to follow the funds in the hands of the bank.
4. ———. The act of February 11th, 1881, (Sess. Acts 1881, p. 35,) does not authorize such an action.
5. ———: "LOANING OUT." The prohibition found in section 1327, Revised Statutes, against public officers' "loaning out" the public moneys, does not forbid the depositing of such moneys in bank.

Appeal from Adair Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Ben. Eli Guthrie and James Ellison for appellant.

If the money deposited in the Savings Bank, is the money of the State, there can be no question that plaintiff

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should recover in this action, and is entitled to payment in full before all other creditors of said bank. Acts 1881, 35; R. S. 1879, § 184; 1 Kent 262; R. S. U. S., §§ 3466, 5101; *Bayne v. U. S.*, 93 U. S. 642; *Beaston v. Bank*, 12 Pet. 134; *U. S. v. Fisher*, 2 Cr. 358.

It is the conceded rule of the distribution of insolvent estates, that the sovereign is entitled to priority of payment. 1 Kent (10 Ed.) 269; *State v. Rodgers*, 2 H. & McH. 198; *Robinson v. Bank*, 18 Ga. 96; *Comm. v. Lewis*, 6 Binn. 266; *Jones v. Jones*, 1 Bland Ch. 443; *Murray v. Ridley*, 3 H. & McH. 171; *Hoke v. Henderson*, 3 Dev. 12; *Smith v. State*, 5 Gill 45; *Green's Estate*, 4 Md. Ch. 349; *Orem v. Wrightson*, 57 Md. 34; *State v. Bank*, 6 Gill & J. 205. Missouri, both in her legislature and in her courts, has always recognized and enforced this principle. R. S. 1845, p. 90, § 1; R. S. 1855, p. 151, § 1; R. S. 1865, p. 501, § 1; *State v. Rowse*, 49 Mo. 586; *Parks v. State*, 7 Mo. 194. The rights of the government are always held paramount to those of the citizen. *Hawthorn v. St. Louis*, 11 Mo. 59; *Fortune v. St. Louis*, 23 Mo. 239; 1 Dillon Munic. Corp., §§ 64, 65; R. S. 1879, §§ 2344, 2519.

Of the moneys deposited, the county revenues are certainly the State's property. They are collected "to defray the expenses" of the county. R. S., § 6798. The county is simply a political division of the State, and all government therein is the State's government. *Reardon v. St. Louis Co.*, 36 Mo. 561; *Ray Co. v. Bentley*, 49 Mo. 242; *Swineford v. Franklin Co.*, 73 Mo. 279; *Barton Co. v. Walser*, 47 Mo. 201; *Cedar Co. v. Johnson*, 50 Mo. 227. This fund for "current county expenses," cannot be reached by the judgment of the creditor of the county, until all ordinary current expenses are provided for: Because the government must be carried on, the public must be secure, though the individual may suffer. *Grant v. Davenport*, 36 Iowa 401; *Coffin v. Davenport*, 26 Iowa 515; *Iowa R. R. Co. v. County of Sac*, 39 Iowa 134; *French v. Burlington*, 42 Iowa 618; *Von Hoffman v. Quincy*, 4 Wall. 549; *Comm. v. Lan-*

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caster Co., 6 Binn. 5; *Comm. v. Philadelphia Co.*, 1 Whart. 1; *s. c.*, 2 Whart. 289; High on Extr. Leg. Rem., § 352. Our legislature fully recognizes this doctrine. R. S., § 5370; *State v. Macon Co. Ct.*, 68 Mo. 46. It is the State's money. *State v. St. Louis Co. Ct.*, 34 Mo. 570; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 3; *St. Louis v. Shields*, 52 Mo. 351. *Conner v. Bent*, 1 Mo. 235; 1 Dillon Munic. Corp., (2 Ed.) §§ 34, 35, 39; *Meriwether v. Garrett*, 102 U. S. 472; *Supervisors v. Springfield*, 63 Ill. 66; *People v. Power*, 25 Ill. 187; *County of Richmond v. Lawrence*, 12 Ill. 1. The county revenue is assessed and collected by the same officers, extended on the same books, on the same property, has the same liens, rights, remedies and penalties for its collection as what, for sake of distinction, is termed the State revenue. R. S. 1879, §§ 6658, 6663, 6733, 6744, 6789, 6804, 6805, 6831, 6832, 6833. The county revenue, while handled and disbursed by what, for the sake of distinction, are called county officers, is applied and disbursed for State purposes only, and cannot, under the law, be converted to any other purposes. *State v. Macon Co. Ct.*, 68 Mo. 29, 48; *Meriwether v. Garrett*, *supra*; R. S., §§ 6818 to 6823, 6579, 6590, 4102, 4125, 4127.

So, also, the school funds belong primarily to the State. *Marion Co. v. Moffett*, 15 Mo. 604; *Holt Co. v. Harmon*, 59 Mo. 170; *Jasper Co. v. Shanks*, 61 Mo. 332; *Township v. Boyd*, 58 Mo. 276; *State v. New Madrid Co. Ct.*, 51 Mo. 82; *Washington Co. v. Boyd*, 64 Mo. 183, *Johnson Co. v. Gilkeson*, 70 Mo. 645; Const. Mo. 1875, art. 11, § 1; art. 9, § 1; R. S., chap. 150; R. S., § 7090.

It follows that whoever owes any of these funds is debtor to the State; that the distribution thereof into the hands of different custodians, is simply a matter of a manifestly proper public policy, for safety, convenience and economy of administration. Hence, the State is entitled to sue. *Keokuk v. Lane*, 31 Iowa 119; *Broechus v. Morgan*, 5 Cent. L. J. 53; *Van Alen v. Am. Nat. Bank*, 52 N. Y. 1; *Bunting v. Hicks*, 2 Dev. & B. Eq. 130; *s. c.*, 32 Am. Dec.

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699; *State v. Bank*, 45 Mo. 528. And the State having the right to recover, and the defendant being insolvent, she is entitled to priority of payment and first satisfaction in full, by the common law as above stated and by the statute. Acts 1881, p. 35.

Nor is there place found in our system of laws and policy of public administration for the doctrine that public revenues coming into the hands of receiving or disbursing officers become the property of such officers; they becoming the absolute debtors of the State simply, and the State losing all interest, right and claim in and to such revenue. R. S., §§ 1326, 1327; *State v. Clarkson*, 59 Mo. 149; *State v. Flint*, 62 Mo. 393; R. S., §§ 6802, 6820, 1331; *Cumberland v. Pennell*, 69 Me. 357; s. c., 31 Am. Rep. 284; R. S., §§ 5378, 6741, 6795, 6796, 6780, 6782, 6822, 6823; *U. S. v. Thomas*, 15 Wall. 337.

A general deposit of money in a bank is a loan. The bank becomes the owner of the money and the debtor of the depositor, and he is simply a creditor of the bank. The bank is borrower; the depositor is loaner. Morse on Banks, (2 Ed.) p. 28; *Matter of Franklin Bank*, 19 Am. Dec. 413, and note 478. Trammel by an attempted general deposit of the funds in his hands, would have committed a felony. R. S. 1879, §§ 2326, 1327. The bank acquired no title as against the State, county or anybody else having title. Felony can confer no title. The bank knew the felony, and was *particeps criminis*. *State v. Hays*, 52 Mo. 578.

Dysart & Mitchell and *Charles P. Hess* for respondent.

The funds mentioned in plaintiff's petition are not State funds, and the State would have no right of action in respect to said funds, even if it were admitted that they had been misappropriated. It has been the policy of this State, since the adoption of the constitution of 1875, to keep the State revenue proper separate and distinct from

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county and other corporate revenues. The State can only tax for State purposes, and is prohibited from imposing taxes upon counties, cities, towns and other municipal corporations; and, in fact, has adopted the most complete and radical system of corporate autonomy of any State in the Union. Const. 1875, art. 10, §§ 1, 8, 10, 11, 15, 17, 19, 20; also art. 4, § 43; R. S. 1879, §§ 6658, 6663, 6733, 6750, 6769, 6780, 6781, 6782, 6891. As to duties of State officers respecting State revenue. Chap. 164, p. 1478, and art. 2 of said chap., p. 1493; R. S., §§ 5366, 7131, 5378, 7021, 7031, 7434, 7103, 7106. Township organization prevails in Macon county, and a reference to the constitution and laws passed thereunder show that large and important powers and privileges have been conferred upon counties, townships, school districts, central or special school districts, cities and towns. They are invested with the power of self-government; with the powers and privileges of corporations; to acquire, hold and sell property; to sue and be sued. A similar policy prevails in Michigan. *Perley v. Muskegon Co.*, 32 Mich. 132. In that state the state cannot sue for county revenue illegally disposed of by the county court. *Att'y Gen. v. Moliter*, 26 Mich. 444. The constitution forbids this State to loan its credit or contract debts, etc. But allows counties and other municipalities, under certain restrictions to create debts, and to levy taxes for their payment. Art. 4, § 44, *et seq*; art. 10, § 12; art. 9, § 19. Such debts are not the debts of the State, nor are the taxes raised for their payment the money of the State.

When Trammel, as county treasurer, received the county moneys and the township school funds, he became a debtor to said county and school townships, and was liable upon his bond to account for and pay the same at all events. He had the right to deposit it in the Macon Savings Bank, but took the risk of its being on hand when required for disbursement, and when so deposited, he became the sole creditor of said bank. *State v. Powell*, 67 Mo. 395; *State v. Moore*, 74 Mo. 413; *Perley v. Muskegon*,

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32 Mich. 132; *Swartwout v. Mechanics' Bank*, 5 Denio 555; *Inhab., etc., v. Bell*, 9 Met. 499; R. S. 1879, § 1328; New Const. 1875, art. 10, § 17; *Thompson v. Tp. Trustees*, 30 Ill. 99; *State v. Harper*, 6 Ohio St. 607; *Halbut v. Martin Co.*, 22 Ind. 125; *Inhab., etc., v. Hazzard*, 12 Cush. 112; *U. S. v. Prescott*, 3 How. 578; *Supervisors v. Dorr*, 25 Wend. 440; *Comm. v. Comley*, 3 Pa. St. 372.

The State has no right of priority for its claims against an insolvent by the common law. Such right rests exclusively on statutes, and such statutes, being in derogation of common right, will be strictly construed. *Freeholders, etc., v. State Bank*, 29 N. J. Eq. 268; *s. c.*, 30 N. J. Eq. 311, 339; 1 Kent Com., side p. 247; 8 Cent. L. J. 62; *State v. Harris*, 2 Bailey 598; *Commissioners v. Greenwood*, 1 Dess. Eq. 449; *Keckley v. Keckley*, 2 Hill Ch. 256; *Anderson v. State*, 23 Miss. 459. The priority of the State, when granted by statute, is confined to debts of the State, where the State had a right of action in its own right. *Bank v. Gibbs*, 3 McCord 377; *Field v. Wheatley*, 1 Sneed 351.

HOUGH, C. J.—P. Trammel, treasurer of Macon county, deposited in the Macon County Savings Bank, from time to time, between November 2nd, 1880, and February 15th, 1882, certain county and township funds, lawfully in his possession as such treasurer, which were entered on the books of the bank to the credit of "P. Trammel, Treasurer;" and on the last mentioned date, the balance so held by said bank amounted to \$39,522.84. On the said 15th day of February the bank failed, and made an assignment for the benefit of all its creditors. Thereupon a claim for said balance was presented in the name of the State to the assignee, and an allowance thereof demanded, as a preferred claim under the provisions of the act of February 11th, 1881. That act is as follows:

Section 1. Whenever any person indebted to the State of Missouri is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or ad-

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ministrators is insufficient to pay all the debts due from the deceased, the debts due to the State of Missouri shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed; Provided, That nothing in this act contained shall be construed to interfere with the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attendance, during the last sickness of the deceased, nor funeral expenses.

Section 2. Every executor, administrator, assignee or other person, who pays any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the State of Missouri from such person or estate, shall become answerable in his own person and estate for the debts so due to the State of Missouri, or for so much thereof as may remain due and unpaid.

Section 3. Whenever the principal in any bond given to the State of Missouri is insolvent, or whenever such principal being deceased, his estate and effects which come to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and in either of such cases, any surety on the bond, or the executor, administrator or assignee of such surety, pays to the State of Missouri the money due upon such bond, said surety, his executor, administrator or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the State of Missouri, and may bring and maintain a suit upon the bond in law or equity in his own name for the recovery of all moneys paid thereon.

The assignee refused to allow the claim presented as a preferred claim due to the State, but allowed the same in

the name of P. Trammel, Treasurer, for \$39,522.84, payable *pro rata* out of the bank assets, as other non-preferred claims, and this action of the assignee was affirmed by the circuit court. The questions presented are as to the right of the State to maintain this proceeding, and to claim priority of payment under the provisions of the act of 1881, above quoted.

It was decided in the case of the *State ex rel. Township, etc., v. Powell*, 67 Mo. 395, that the treasurer of a school township is liable on his official bond for school funds deposited in bank and lost through the failure and insolvency of the bank, although he was not guilty of any want of care or prudence in failing to ascertain its financial condition; that when he deposited the school money in his hands to his credit as trustee and treasurer, the bank simply became indebted to him in his official capacity, and he took the risk of being able to collect the money when he should require it. This decision was affirmed in *State ex rel. Mississippi Co. v. Moore*, 74 Mo. 413, in which case it appeared that funds of the county were lost by reason of a deposit thereof by the county treasurer in a bank which failed. In both of these cases the suit was on the bond of the officer. This proceeding is instituted by the State against the assignee of the depositary to recover county and township funds deposited by the officer.

The State has an undoubted right to dispose of the revenues collected under its authority for county and township purposes, as it may see proper, when such disposition does not impair the obligation of some contract; but having once provided by law how such revenues shall be disposed of, no other or different disposition can be made of the same, except by the exercise of the legislative power of the State. Under the laws now in force, the funds in question here belong to the county and the townships, and the State has no right to sue for the recovery of such funds except in actions brought to the use of the county, on the

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bonds of officers, which are by law required to be given to the State for the use of the county. *State ex rel. Saline Co. v. Sappington*, 68 Mo. 454. Where the action is not on a bond given to the State, the suit should be brought in the name of the county. *Lafayette Co. v. Hixon*, 69 Mo. 581; and in counties where the township organization law is in force, in the name of the township.

But if the funds in question were specifically the revenues of the State, as contradistinguished from the revenues of the county, and were required by law to be paid into the State treasury, to be disbursed for the support of the State government proper, no action could be maintained by the State even against the official custodian of such funds, until he had made default in the payment thereof to the State treasurer, as required by law. No such default appears in this record. The conceded insolvency of the county treasurer, will not, of itself, give a right of action; there must be an actual default in payment as provided by law. The treasurer may meet his obligations to the State notwithstanding his insolvency. It certainly cannot be seriously contended that the State may sue a depositary of the county treasurer to recover money wrongfully withheld from the treasurer by such depositary before the State has any right of action against the treasurer. If such action could be maintained, and the State should recover, the money recovered, if not then due to the State, would have to be again placed in the hands of the treasurer who is entitled to the custody thereof, until required by law to pay it to the State, and the treasurer could again deposit it, and perhaps render another action by the State necessary, to again restore it to the custody of the officer. The exercise of such a guardianship as this over State and county officials charged with the duty of collecting the public revenues, would manifestly be absurd.

Furthermore, the State does not sustain the relation of creditor to the depositary of the officer. By the decisions

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3. STATE FUNDS DEPOSITED IN BANK.

above cited, the officer is the creditor, and the bank is the debtor of the officer, and the officer alone can maintain an action to recover funds deposited by him. In all ordinary cases, the State must rely upon the bond of the officer, and has no right to pursue the defaulting depositaries of the officer, except by way of garnishment on execution against the officer. In case, however, of fraudulent collusion between the officer and the depositary, it may be that the State would have a right in equity to pursue the funds of the State in the hands of the fraudulent possessor, in the event of the insolvency of the officer and his sureties, but, even then, not as a preferred creditor under the act of 1881.

That act was never intended to authorize a proceeding like the present. The 3rd section of the act, which pro-

4. — provides that when the sureties of an insolvent principal in any bond given to the State, shall pay the amount due upon such bond, they shall have the same priority against such insolvent principal, or his estate, as is secured to the State, and also a right of action on the bond, makes it evident, we think, that the legislature never contemplated giving any priority to the State in the assets or estates of persons who might be indebted to such insolvent principals; and that, for the very simple reason that such principals themselves have no such priority.

But notwithstanding the decisions heretofore cited, it is urged on behalf of the State that Trammel had no right

5. — to make a general deposit of the county revenues held by him, for the reason that such deposit amounted to a loan of the money to the bank, which is, by section 1327 of the Revised Statutes, declared to be a felony, and that the bank, therefore, could not in law become a debtor to Trammel on account of said funds, and the same are not subject to the demands of the creditors of the bank, but must be restored to the plaintiff as the real owner thereof. The right of the State to the funds in question has already been passed upon. As to the other

point: It is doubtless true that every general deposit is so far, in effect, a loan, as to create the relation of debtor and creditor between the bank and the officer; (Morse on Banking, 28;) but, we are not, therefore, inclined to hold that general deposits in bank by county and State officials, other than the State treasurer, whose duties in this regard are prescribed by the constitution, are within the inhibition of section 1327, *supra*.

That section is as follows: "No such officer, agent or servant," (State, county or city official,) "shall loan out, with or without interest, any money or valuable security received by him or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof by indictment, shall be punished by imprisonment in the penitentiary not less than two years, or by a fine not less than \$500." Section 1328 provides that when any such officer shall make any contract with any person or corporation, by which he is to receive any benefit or advantage from the deposit with such person or corporation of funds in his hands as such officer, such agreement, as to such officer, shall be null and void, but the State may sue for and recover all such benefit or advantage, as would by the terms of the contract have accrued to the officer. Section 1329 provides that any officer who shall make any such contract as is described in section 1328, or who shall receive any benefit or advantage from any deposit by him of funds held by him as such officer, shall be punished by imprisonment in the penitentiary, or by fine not less than \$500.

These sections were all enacted at the same time, and appear for the first time in the revision of 1855, and when construed together manifestly indicate a purpose on the part of the legislature to discriminate between a deposit in bank for safety and convenience, and an ordinary loan. Section 1327 punishes the making of all loans, whether

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made for profit or not, and section 1329 punishes, not the making of a deposit simply, but the making of a deposit with a view to profit on the part of the officer. The object of sections 1328 and 1329 is to compel the officer to look alone to the security of the funds in selecting a depository, and not to his own emolument, and these sections impliedly sanction deposits when they are not made in violation of their provisions.

The judgment of the circuit court will, therefore, be affirmed. The other judges concur.

WILCOX V. OSBORN *et al.*, Appellants.

1. **Deed: CERTIFICATE OF ACKNOWLEDGMENT.** A certificate of acknowledgment of a deed, which shows that the acknowledgment was made by the grantor, but omits to name him, is not void for the omission.
2. **Swamp Lands, Conveyance of.** Even if it be true that under the laws in relation to swamp lands, as they stood in 1860, the Governor and not the county commissioner, was the proper officer to execute deeds to such lands, yet when the commissioner executed a deed, if the county received the purchase money, the equitable title vested in the purchaser, and the curative act of 1868, (Acts 1868, p. 67,) passed the legal title to him.
3. **Estoppel, as between Grantor and Grantee.** The rule is well established that the grantee is not estopped to deny the grantor's title, but this rule is not applicable to a case in which the only title asserted by the grantee is the precise title he has acquired from the grantor, nor to a case in which both parties claim from a common source and the title is identical in that source.

A county having received the purchase money for a tract of swamp land, caused a deed to be made to the purchaser by the county commissioner. On the same day the county made a loan of school funds, taking as security a mortgage on the land. Subsequently the county caused the mortgage to be foreclosed. The defendant in this case derived title through this foreclosure. *Held*, that, as against the heirs of the original purchaser, the defendant was estopped to deny the validity of the commissioner's deed.

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4. **Administrator's Deed.** In pursuance of an order of the probate court made February 10th, 1861, an administrator, in April, 1861, sold real estate, and immediately executed and delivered a conveyance, and made out a report of sale; but the report was never presented to the court until July, 1862, at which time an order was made approving the sale as of the April term, 1861, and on the same day the administrator's letters were revoked. *Held*, that while the proceedings were irregular, the irregularity was not such as to invalidate the deed.
5. **Sheriff's Sale.** A sale by the sheriff under a school mortgage made in vacation of the circuit court, is void, both in direct and collateral proceedings.
6. **Adverse Possession.** Notwithstanding the paper title of opposing parties may be derived from a common grantor, either may assert against the other an independent title by possession.
7. **Mortgages.** A sale under defective foreclosure proceedings, although it may not carry the legal title to the land, will operate as a transfer of the equitable title to the mortgage.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY,
Judge.

AFFIRMED.

Johnston & Jackson for appellants.

John Edwards for respondents.

MARTIN, C.—This was a suit in equity, commenced on the 23rd day of May, 1877, for the purpose of enforcing the right of redemption to a parcel of land in Nodaway county, containing eighty acres. The plaintiffs obtained possession a few months before the suit. The defendant, Lewis Osborn, denied the plaintiffs' title and set up a title in himself, starting from a source common with the plaintiffs' source of title. He also claimed the absolute title by virtue of an occupation and possession for a sufficient length of time to bar the plaintiffs' claim of title and vest himself with the fee. The other defendants admitted the allegations of their petition and joined with the plaintiffs in their prayer for relief.

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At the trial the plaintiffs put in evidence the record title of both sides. I will briefly notice these chains of title relied on by the parties, respectively. The chain of title is as follows: A patent from the State of Missouri to Nodaway county, conveying certain swamp lands including the parcel in dispute, dated June 26th, 1869, made in pursuance of the act of the legislature of March 10th, 1869; next a deed from Nodaway county, by its commissioner, to Isaiah Wilcoxon and Mark Murphy, dated June 4th, 1860, recorded November 28th, 1860, the name of the grantor being left out of the certificate of acknowledgment; this deed purports to have been made in fulfillment of a contract of purchase given to Chas. B. Lee, February 21st, 1856, by the county, which contract, or certificate, had been assigned to Wilcoxon and Murphy; next, a mortgage deed of said Wilcoxon and Murphy to Nodaway county, dated June 4th, 1860, securing a loan of \$100 from the school fund, this mortgage providing for sale by the sheriff in the default of payment of principal or interest of the loan; next, a warranty deed by Mark Murphy and wife to George H. Wilcoxon, dated April 6th, 1861; and conveying an undivided half of the land; next a deed by Isaiah Wilcoxon's administrator to George H. Wilcoxon, dated April, 1861, and acknowledged and recorded on the 6th and 9th of April, 1861. By virtue of these deeds it is claimed that the title to the land vested in George H. Wilcoxon, subject to the mortgage to the county to secure the \$100 borrowed from the school fund, June 4th, 1860. He died intestate on the 8th day of April, 1863, and left seven children, all minors, four of whom are plaintiffs, viz: Sallie, Marion, Josephine and John, and three are defendants, viz: Amanda, Anna and Alfred.

The adverse title, under which the defendant, Osborn, claims the land, forks out from the plaintiffs' chain of title through the mortgage of June 4th, 1860, given to secure the loan from the school fund, and runs as follows: 1st, The sheriff's deed to Nodaway county, acknowledged Au-

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gust 16th, 1865, reciting the mortgage of June 4th, 1860, an order of the county on the sheriff to sell on account of a default in the mortgage, and a sale to said county on the 14th day of August, 1865, at public vendue, for \$17; next, a deed by said county, through its commissioner, to Nathan Paton, acknowledged and recorded August 17th, 1865; next, a deed of said Paton and wife to Richard Boatman of the 8th day of October, 1866; next, a deed from said Boatman to Jacob Roth of the 12th day of October, 1868; next, a deed of said Roth to Lewis Osborn, defendant, of the 4th day of March, 1870.

From other testimony introduced, it appears that after the death of George N. Wilcoxon, in 1863, who had resided on the land with the plaintiffs, who were his children, his widow sold her dower right in the land and improvements, which consisted of three cabins and a mill, to Edward Spencer, and removed with the children to Iowa, thence to Southwest Missouri, and afterward to Kansas; that the children first heard of their interest in the land in 1876 from a person who came to them in Kansas for a quit-claim deed; that they returned with their mother, and finding the land unoccupied and the improvements all taken off, put up a tent on it, and entered into peaceable possession of it in January, 1877, which possession they continued to hold, having since their entry built a log cabin on it for their residence.

As to the possessory title of defendant, it seems that after the deed of the county to Paton of August 17th, 1865, the land was possessed and occupied first by him, then by Boatman, his vendee, under deed of October 8th, 1866, then by Jacob Roth, his vendee, under deed of October 12th, 1868, who occupied it as proprietor until his sale to his brother-in-law, Lewis Osborn, March 4th, 1870. Osborn is a non-resident, and Roth continued in possession for him till 1876, when he removed the fence which constituted the only improvement left on the place at that time. After

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that time the place seems to have remained vacant until the entry of the plaintiffs in January, 1877.

On this evidence the court, on the 29th day of January, 1878, rendered a decree in favor of the plaintiffs, and the defendant, Alfred Wilcoxon, permitting them to redeem under the mortgage of June 4th, 1860, mentioned in the petition, five-sevenths of the land, by payment to defendant Osborn of the sum of \$330, being five-sevenths of the amount due on the mortgage and for taxes. Amanda and Anna, defendants, were held to be barred by the statute of limitation. The defendant Osborn has, for himself, prosecuted this appeal.

I. The defendant insists, in his brief, that the only right the ancestor of the plaintiffs ever had in the land was a right to purchase in pursuance of the certificate of purchase of February 21st, 1856, which Wilcoxon and Murphy acquired from Charles B. Lee. It is denied in the answer that Wilcoxon and Murphy borrowed \$100 from the school fund to complete the purchase, or that the bond and mortgage given by them on the 4th day of June, 1860, were given to secure a loan of that amount of the school fund. On the contrary, it is averred that the mortgage of June 4th, 1860, was in truth given by them to secure the purchase money for the land called for in the certificate of purchase, and that said purchase money has never been paid, and that the plaintiffs and their ancestor abandoned the right to a deed under said certificate, and have lost all right to have a deed from the county in pursuance thereof.

This position cannot be maintained in face of the evidence disclosing the character of the transaction with the county. The evidence goes to show that the certificate was surrendered as paid, and that the mortgage was to secure a loan from the school fund. The mortgage recites the language of the bond it was given to secure, and that language declares it was given to secure a debt payable to the use of the school fund. This recital, which is binding on the county, sustains the position of the plaintiffs that

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enough was borrowed from the school fund to pay for the land, and that the mortgage was given to secure the loan, and not the purchase money. This suit is brought to redeem the land from this mortgage, and not to pay the purchase money and complete the purchase. The plaintiffs clearly have no right of purchase. If they have anything at all it must be an estate in the land.

II. I will first consider the record title and estate of plaintiffs. The defendant assails two deeds in the plaintiffs' chain of title, viz: the deed of the county by Commissioner Bickett to Wilcoxon and Murphy of June 4th, 1860, made under the swamp land act, and purporting to convey the whole title, and the deed of Isaiah Wilcoxon's administrator to George H. Wilcoxon, of April, 1861, for an undivided half of the land.

In respect to the first mentioned deed, it is claimed that the acknowledgment of the commissioner is defective, because he is not mentioned by name in the certificate of acknowledgment. The clerk certifies that "personally appeared ———, who is personally known to me to be the same person whose name is subscribed to the within and foregoing conveyance as having executed the same as party thereto, and in the capacity therein set forth, and acknowledged the same to be his act and deed for the purposes therein mentioned. In testimony whereof," etc. His name as grantor of the deed is subscribed to it, and appears in the body of the deed. A certificate must be construed with reference to the deed it is attached to, and the deed is always allowed to help out the construction of the certificate. *Martindale on Conveyances*, § 259; *Samuels v. Shelton*, 48 Mo. 444; *McClure v. McClurg*, 53 Mo. 173; *Carpenter v. Dexter*, 8 Wall. 515; *Chandler v. Spear*, 22 Vt. 388; *Wells v. Atkinson*, 24 Minn. 161; *Sharpe v. Orme*, 61 Ala. 263; *Middleton v. Findla*, 25 Cal. 80. The material requisite of an acknowledgment is complied with, when it appears from the certificate, that the grantor of the deed appeared before the officer and ac-

1. DEED: certificate
of acknowledgment.
ment.

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knowledgeed it to be his act and deed. I think it sufficiently appears from this certificate that it was the grantor and no one else who appeared and acknowledged it. Under the strict ruling in *Lincoln v. Thompson*, 75 Mo. 613, this certificate would be good. In that case one name was subscribed to the deed, and another one mentioned in the certificate, so that an apparent contradiction was presented on the face of the instrument. In this case no such contradiction appears. The certificate does not formally recite the name of the person making the acknowledgment, but declares that it was the grantor, and that, I am satisfied, is sufficient.

III. The deed of the county, of June 4th, 1860, by its commissioner, is objected to by the defendant on the ground that the county could not, by commissioner or otherwise, sell any swamp land without payment of the purchase money. The deed recites that the purchase money has been paid; and this recital is sustained by the evidence in the case showing that the money to pay for the land was borrowed from the school fund.

It is objected that under the swamp land acts, the Governor, and not the commissioner, was the proper person to make the deed after payment of the purchase money. I am inclined to the view that the receipt of the purchase money by the county, and delivery through its authorized agent of a memorandum of sale, operates to vest the equitable title in the purchaser as it would between any two citizens. Perhaps the Governor was the proper party to make the deed, but it certainly ought to follow the actual purchase. The curative act of 1868, (Sess. Acts 1868, p. 67,) was intended to cure these defects and add the legal to the equitable right of the purchaser; and it was held to effect this in the case of *Barton Co. v. Walser*, 47 Mo. 189; and I perceive no good reason why that case should not apply to the deed in question, if it is defective in the manner mentioned.

But I apprehend it is not necessary in this case to con-

2. SWAMP LANDS,
CONVEYANCE OF.

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sume time in attempting to explain or reconcile the many acts of our legislature relating to swamp lands. This is not an action of ejectment in which the plaintiffs must maintain their right of possession by a paramount title. They are already in possession. They describe a certain swamp land title, originating in a certain way and claimed under certain conveyances by opposing parties, and they seek to enforce against the opposing claimants their right of redemption, which shall return that title and no other to them.

Now it seems to me the defendant is not in a position to maintain that Wilcoxon and Murphy were not owners S. ESTOPPEL, AS BETWEEN GRANTOR AND GRANTEE. of the county's title on the 4th day of June, 1860, when the mortgage was made. That mortgage was made on the same day the county assumed to convey the land to them. The disputed deed made to them on that day was delivered after receipt of the money from them, and after they had surrendered their certificate of purchase. The county, in taking the mortgage for the school fund at that time, necessarily knew that it was made on the faith of the deed to them of the same date. The two deeds are parts of the same transaction. To allow the county under these circumstances to deny the title of its mortgageors, which it had assumed to confer on them, and for which it had received the purchase money, would work an injustice against them. It would also be authorizing the county to adopt the beneficial part of a transaction and repudiate that which included a reasonable liability, against conscience and equity. *Austin v. Loring*, 63 Mo. 19. Besides, it is in evidence that after accepting the mortgage, the county never claimed any title to the land except by virtue of the mortgage and proceedings to foreclose under it.

I am well aware that our Supreme Court has, by repeated decisions, laid down the doctrine that the relation of vendor and vendee is antagonistic, and that the vendee is not estopped from denying the vendor's title. *Macklot*

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v. Dubreuil, 9 Mo. 473; *Landes v. Perkins*, 12 Mo. 238; *Blair v. Smith*, 16 Mo. 273; *Cutter v. Waddingham*, 33 Mo. 269; *Mattison v. Ausmuss*, 50 Mo. 551. It will be found on examination of these cases that they are to the effect that an estoppel cannot be invoked against the right of the grantee to set up an outstanding or after-acquired title or a title under the statute of limitation, by which to fortify his position. But this rule is not applicable to a case in which the only title asserted or claimed by the grantee is the precise title he has acquired from the grantor. *Bigelow on Estop.*, (2 Ed.) 335. Neither has it been applied to a case in which both parties claim from a common source, and the title is identical in that source. *Bigelow on Estop.*, (2 Ed.) 335, 336; *Brown v. Brown*, 45 Mo. 412.

Such is the present case. The plaintiffs claim the title of Wilcoxon and Murphy subject to their mortgage. The defendant claims the same title by and through a foreclosure of that mortgage. The county assumed to foreclose the mortgage by proceedings in the county court culminating in a sheriff's deed to the county in August, 1865, in which the mortgage deed is recited and its validity recognized. The sale to the county was on the 14th day of August, 1865, and the sheriff's deed was acknowledged on the 16th day of August, 1865. On the same day the county court enters an order empowering Leander P. Ellis, president of the court, to convey the land by deed to Nathan Paton in consideration of \$109, paid by him into the treasury. The president makes his deed to Paton on the 17th day of August, 1865, which is recorded on the same day. Paton afterward, in 1866, conveys to Boatman, and the title thus passes down to Osborn. The proximity in time of these conveyances is a significant fact bearing upon the character of defendant's title and of his claim of right under it. *Fontaine v. Boatman's Saving Institution*, 57 Mo. 552.

It is true the defendant now seeks to escape the effect of these deeds by claiming that the title of Paton from the county has no connection with the sale under the mort-

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gage. In his answer, he pretends that the county conveyed to Paton after the plaintiffs had abandoned their alleged right of purchase. But this is contrary to the truth of the case. The plaintiffs had no right of purchase; and the county did not convey to Paton until it assumed to have a new title under the mortgage. The execution and regularity of the mortgage is admitted by defendant in his answer, and the county, before conveying to Paton, entered of record an order recognizing its validity and ordering a sale under it. The mortgage was never abandoned or surrendered by the court, but was kept alive by order of the county court for the purpose of foreclosure.

The fact that the proceedings in foreclosure may have been irregular, cannot affect the conclusion that the validity of the mortgage was recognized by the county, and that its subsequent claim of title emanated from it, when it assumed to buy at the foreclosure sale, and in a few days afterward assumed to convey to Paton. Indeed, the only title which the deed to Paton could have been effectual to convey, must have been the title acquired at the foreclosure sale. When swamp land is once legally disposed of by the county, and is purchased back again by the county in foreclosing a mortgage for a school debt, it is no longer swamp land thereafter, but is held like any other real estate acquired in that way. The county has the right to dispose of it as the county attempted in 1865 to dispose of this land to Paton, by the deed of the president of the county court, in compliance with the Revised Statutes of 1855. R. S. 1855, p. 502, § 2.

If the deed of the county commissioner in 1860 failed to convey this land to Wilcoxon and Murphy, it is true the land in that event, would remain in the county as swamp land subject to the swamp land acts. And this is the position of the defendant. But in this view of the matter, the deed to Paton could not effect a conveyance of the title, it being for swamp land, and at that time subject to the act of 1857, applying to Nodaway county, which required all

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sales of swamp lands to be made in public at the courthouse after sixty days' notice. Sess. Acts 1857, p. 387. The curative act of 1868 could not help the sale to Paton without curing the sale to Wilcoxon and Murphy, and making that a better one, because first in time.

For these reasons I think the county and those claiming the same title from the county, are estopped in equity from maintaining that the county, at the time it was foreclosing the mortgage it held for the school moneys, was already possessed of the identical title upon the faith of which the mortgage was given.

IV. It is objected that the deed of Isaiah Wilcoxon's administrator of 1861, is void for irregularity. This is an objection to a link in the plaintiffs' chain of title below the common source of title, and if it is well taken the plaintiffs will have to give up one-half of their recovery. One-half of their title is derived from Murphy and one-half from Isaiah Wilcoxon's administrator. It is urged by defendant that the report of the administrator's sale was never properly approved. It seems that the sale was regularly made by Edward Spencer, the administrator, in pursuance of an order of court of the 10th day of February, 1861. In April, 1861, the sale was effected, and the report made out, but it was not submitted to the court till July 14th, 1862. On that day an order was made approving the sale as of the April term, 1861. On the same day the letters of administration of Edward Spencer were revoked by order of the court, and a successor appointed. The approval of his report and revocation of his letters were contemporaneous acts. At the time of the approval, the court had jurisdiction of the administration and of the administrator. The deed had been made by Spencer at the time of the sale, long before revocation of his letters. No final settlement had been made. I think this sale is clearly within the cases upholding judicial sales, notwithstanding minor irregularities. *Mc Vey v. Mc Vey*, 51 Mo. 406; *Rugle v. Webster*, 55 Mo. 246;

4. ADMINISTRATOR'S SALE.

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Jones v. Manly, 58 Mo. 559; *Garner v. Tucker*, 61 Mo. 427; *Long v. Joplin M. & S. Co.*, 68 Mo. 422.

V. Having disposed of the objections of defendant to the plaintiffs' chain of title, I will consider the objections of the plaintiffs to the defendant's deeds.

If the foreclosure of the mortgage of Wilcoxon and Murphy was in compliance with law, then the plaintiffs' title went back to the county, and by virtue of subsequent conveyances it vested in the defendant Osborn. It seems from the evidence in the case that the sale ordered by the county court was made by the sheriff on the 16th day of August, 1865, during the session of the county court, but not during a session of the circuit court. It was during vacation of the latter court. Such a sale is void in both direct and collateral proceedings. *McClurg v. Dollarhide*, 51 Mo. 347; *Merchants' Bank v. Evans*, 51 Mo. 335; *Bruce v. Leary*, 55 Mo. 431. This deprives the defendant of the only title which the county ever undertook to convey to defendant or his grantor. It never undertook to convey to Paton the original swamp land title possessed by it, but only the title supposed to have been acquired at the sheriff's sale. The county, and all parties privy with it, were estopped from denying that Wilcoxon and Murphy owned the original swamp land title in 1860.

VI. The defendant is not estopped from setting up an independent title derived from possession. The adverse possession of the land by him, and those under whom he claims, from 1865 to 1876, would give him absolute title as to all persons, except such as are under the disability of coverture or minority. Such a length of time would also bar the claim of the plaintiffs for redemption of their title or any other title to the land. It seems clear from the evidence that the five parties in this case to whom the court adjudged the right of redemption, are not barred, the running of the statute having

6. ADVERSE POSSESSION.

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been arrested by their minority, so as not to leave ten years' adverse holding by defendant or his grantors.

While the sale under the mortgage failed to carry the legal title of the land, it operated to vest the equitable title to the mortgage in the purchaser, and the court acted properly in giving the defendant the benefit of the mortgage in the decree of redemption. *Honaker v. Shough*, 55 Mo. 472; *Jones v. Mack*, 53 Mo. 147; *Russell v. Whitely*, 59 Mo. 196.

The decree as made by the circuit court is accordingly affirmed. PHILIPS, C., concurs; WINSLOW, C., absent.

THE STATE ex rel. CUNNINGHAM, Appellant, v. WILSON.

The State v. Rubey, *ante*, p. 610, followed.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Ben. Eli Guthrie and *A. L. Gilstrap* for appellant.

Dysart & Mitchell with *Chas. P. Hess* for respondent.

HOUGH, C. J.—The relator, as collector of the county of Macon, deposited with the Farmers and Traders' Bank in Macon City, to his credit, as collector, certain revenues collected by him, and on the 15th day of February, 1882, said bank failed and made an assignment to the defendant Wilson. This proceeding was instituted for the purpose of obtaining an allowance of the amount due said collector as a preferred claim under the act of February 11th, 1881. Cunningham, the relator, testified as follows: "On settlement February 1st, 1882, I paid over as collector the

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amount of State revenue proper, going directly to the State, then due; and on the 15th, the day the bank failed, I had on hand not paid over, of State revenue proper, somewhere between three and five hundred dollars, perhaps more. I had money in La Plata Bank, public money, besides that in the Macon banks. Much the larger part of the public money in the Macon banks, when they failed, was school money. I made settlement again with the State on the first days of March, April and May, respectively, and paid all the money due the State of Missouri, and am not now in default. My bond is good and solvent."

The assignee made the following allowance of the claim presented: "The within application for an allowance of the within demand as a preferred claim refused, and claim allowed in favor of James H. Cunningham, collector, for \$4,041.70, and classified as an ordinary demand, to be paid *pro rata* with other demands allowed against the assets of said bank." The circuit court affirmed the action of the assignee, and the plaintiff has appealed.

For the reason given in the case of the *State v. Rubey*, assignee of Macon Savings Bank, the judgment of the circuit court will be affirmed. The other judges concur.

THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY V. CLEARY, *Appellant*.

1. **Contracts Limiting Liability of Common Carriers.** A written contract, containing provisions limiting the liability of a railroad company, as a common carrier, in the transportation of cattle; *Held*, in the absence of fraud or mistake, to be the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the cattle were loaded into the cars with a previous verbal understanding as to the terms of shipment, and presented to him for signature when there was no sufficient time for its examination before the departure of the train. Compare *Dawson v. The St. L., K. C. & N. Ry Co.*, 76 Mo. 514.

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2. **An Instruction**, submitting a question of law to the court sitting as a jury, is properly refused.
3. **An Instruction**, which is, under the pleadings and evidence, a mere abstraction, is properly refused.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS,
Judge.

AFFIRMED.

Hale & Eads for appellant.

Wells H. Blodgett for respondent

NORTON, J.—This suit was instituted in the circuit court of Carroll county, to recover of defendant the sum of \$125.50, for transporting six car loads of cattle from Kansas City to Norborne.

It is averred in the petition that plaintiff and defendant entered into a special contract in writing, whereby the plaintiff undertook to transport for defendant six car loads of cattle from Kansas City to Norborne at \$20.50 per car, which it was averred was a reduced rate, in consideration of the undertaking and agreement of defendant to take care of said cattle while on the trip, load and unload the same at his own risk and expense, and that plaintiff should not be responsible for any loss, damages or injury which might happen to said freight in loading, forwarding or unloading, etc. It is also averred that in said contract defendant agreed that any claim for damages that might accrue under said contract, should be made in writing to the general freight agent of defendant within five days after the cattle were unloaded at the place of destination. It is also averred that plaintiff shipped said cattle in pursuance of the contract, and that defendant has failed and refused to pay the price agreed upon.

Defendant, in his answer, admitted that he executed the contract sued upon, but averred that before the same was executed by him, he had verbally agreed with plaintiff

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as to the number of cars, the price to be paid per car, the time of shipping the stock and the manner in which they were to be shipped, and that after said cattle had been loaded in the cars under said verbal contract, and while the train was about starting, and did within a very few minutes thereafter start, the contract set forth in plaintiff's petition was presented to defendant for his signature and "under the impression that said written contract contained substantially the contract that had been previously agreed upon, the defendant, not having time to read the same before the train started, signed the same without any knowledge on his part that it contained the reservations and exceptions therein contained." The answer further set up, by way of counter-claim, that by reason of delays, occasioned by the negligence of plaintiff, defendant's cattle were injured to the amount of \$250, which he asked to be set off against plaintiff's claim and for judgment in his favor for the balance.

The cause was tried by the court without the intervention of a jury, and judgment was rendered for plaintiff for \$125.50, from which defendant has appealed to this court.

On the trial, evidence was introduced tending to prove the averments of the petition, and also evidence tending to prove the allegations of the answer, and the only ground relied upon for a reversal of the judgment is the action of the court in refusing the following instructions asked by defendant:

1. If the cattle referred to in the pleadings and testimony were actually loaded into the cars of plaintiff, as stated in the answer, before the alleged written contract was signed, and were received by the agent of the company with the previous verbal understanding as to the terms of shipment, then the rights and liabilities of the parties to said shipment were fixed, and the liabilities of plaintiff thereunder as common carriers were not modified or changed by said written contract.

2. The liability of plaintiff in this case is that of a

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common carrier, and not a forwarder merely, and the stipulation to that effect in the alleged written contract, is void.

3. The cause of action set up by the defendant in his answer and counter-claim is founded on the alleged wrongful, willful and negligent acts and conduct of plaintiff, and not on the written contract set up in the petition.

4. If the defendant had not the time before the alleged departure of the train after the cattle were loaded, to examine the printed and written conditions of the written contract set up in the petition, and if defendant was leaving on said train with his cattle, to look after and care for same, then any conditions or stipulations in said contract inconsistent with plaintiff's general liability as a common carrier, are void.

While it has been held that a common carrier cannot stipulate against liability for damages resulting from and occasioned by his negligence, it has also been held, he can by special contract with the shipper, limit his liability. *Ketchum v. American Ex. Co.*, 52 Mo. 390; *Read v. St. Louis, K. C. & N. R'y Co.*, 60 Mo. 199; *Rice v. Kansas Pac. R'y Co.*, 63 Mo. 314; *Sturgeon v. St. Louis, K. C. & N. R'y Co.*, 65 Mo. 569. It was held in the case of *O'Bryan v. Kinney*, 74 Mo. 125, that "as a general rule, when goods are delivered to a carrier for transportation and a bill of lading or receipt is delivered to the shipper, he is bound to examine and ascertain its contents, and if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. That he, the shipper, did not read the bill of lading or know its contents, makes no difference; he might have read it and it was his duty to do so, and in the absence of fraud or mistake, the writing must be taken as the sole evidence of the final agreement of the parties." The same principle is announced in the case of *Mulligan v. Ill. Cent. R'y Co.*, 36 Iowa 181, where the terms of a bill of lading were sought to be evaded on

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the ground that the shipper did not know its contents. It was held: "It not appearing that any fraud or imposition was practiced, or that any mistake intervened, the plaintiff must be conclusively presumed to have been acquainted with its contents, and if he did not do so, the consequences of his folly and negligence rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limit it would finally admit." The same doctrine is announced in the cases of *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; *Grace v. Adams*, 100 Mass. 505; s. c., 1 Am. Rep. 131.

Giving force and effect to the above principles, the instructions numbered one and four were properly refused.

Instruction number two was properly refused, because it submitted a question of law and not of fact. Whether
2. AN INSTRUCTION. the liability of plaintiff was that of a common carrier as contradistinguished from that of a forwarder was determinable by the facts, and the facts upon which the liability of plaintiff as a common carrier were predicated should have been stated, so that the triers of the fact could determine whether such facts had been established by the evidence. It makes no difference in this respect that the cause was tried by the court without the intervention of a jury, and this has been so held in the case of *Cape Girardeau Co. v. Harbison*, 58 Mo. 90.

As to the third instruction, while it states correctly that the cause of action set up in defendant's answer by
3. — way of counter-claim, is founded upon the alleged negligence of plaintiff, it is nevertheless true that under the terms of the contract relied upon by plaintiff, defendant was bound to give notice in writing of his claim for damages to the general freight agent within five days after the cattle were unloaded, and it is not pretended that this was done, or any reason shown why it was not done,

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and it, therefore, follows that no injury could have resulted to defendant by refusing an instruction which, when considered in connection with the pleadings and evidence, was a mere abstraction.

Judgment affirmed, in which all concur, except Judge RAY, who was of counsel in the case.

JOHNSON, *Appellant*, v. WILSON.

Priority among Incumbrancers: NOTICE. The grantor in a deed of trust afterward conveyed the land by warranty deed, and subsequently by a second deed of trust, the beneficiary in the latter knowing of the warranty deed. Upon a foreclosure under the first incumbrance, there was a surplus after satisfying the debt. The grantor was insolvent and non-resident. *Held*, that the grantee in the warranty deed was entitled to the surplus in preference to the beneficiary in the second deed of trust.

Appeal from Audrain Circuit Court.—HON. G. PORTER,
Judge.

REVERSED.

The petition in this case alleged, substantially, that one Hepler made two deeds of trust conveying certain lands to defendant, Wilson, to secure the payment of certain notes; that subsequently Hepler made a general warranty deed conveying to plaintiff, for the sum of \$200, sixteen acres of the lands conveyed by his said deeds of trust; that thereafter Hepler and defendant, Barnes, made their joint deed of trust conveying the lands of Hepler already conveyed, including said sixteen acres, and also certain lands of said Barnes, to defendant, Tureman, to secure the payment of the notes of Hepler and Barnes; that the trustee and beneficiary in this third deed of trust, at the time it was made, had full knowledge of the general

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warranty deed; that said Wilson, as trustee, sold under the first two deeds of trust all the lands therein described, including the sixteen acres, and realized thereby \$476 in excess of the secured notes; that the lands belonging to defendant, Barnes, and included in the third deed of trust, were amply sufficient to pay off the notes secured thereby; that Hepler was insolvent and a non-resident, and that plaintiff was without other remedy. The petition prayed for an order that the trustee in the third deed of trust sell the lands of said Barnes conveyed thereby, and that the holder of said secured notes exhaust his remedy therein before applying any part of the said \$476, deposited with him for safe keeping, to the payment of said notes, and that the \$200 purchase price, with six per cent interest, be paid to plaintiff out of said \$476, and for general relief. To this petition there was a general demurrer, which was sustained, judgment was entered for defendant, and plaintiff appealed.

M. Y. Duncan for appellant.

Thos. H. Musick for respondents.

SHERWOOD, J.—The sixteen acres of land conveyed to plaintiff by Hepler, though subject to the former deeds of trust under which the sale took place, was not in equity subject to the last deed of trust, because the parties in interest had notice of the conveyance to plaintiff. He who takes with notice of an equity, takes subject thereto. The case stands before us then precisely as if the sixteen acres had not been sold under the prior deeds of trust, and the defendants were attempting to enforce their subordinate equitable and legal rights against the prior and well known equities of the plaintiff. True, the sixteen acres of land have been converted into money, but this does not affect the question since equity will, on proper occasions, treat money as land, and *vice versa*. The petition concludes with

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a prayer for general relief. This will authorize any relief consistent with the facts alleged. If the sixteen acres of land had not been sold under the prior deeds of trust, it is quite clear that equity would not permit parties who took the third deed of trust with notice of plaintiff's rights to sell his land under such third incumbrance. No more will equity, in the circumstances of this case, permit such parties with notice, to lay their hands on the proceeds of the sixteen acres. Hepler being both non-resident and insolvent, if plaintiff could not obtain re-imbursement out of the overplus, the \$476, he would be remediless; and we think his priority to re-imbursement out of that sum as clear as his priority to the sixteen acres. Therefore judgment reversed and cause remanded. All concur.

RUPE V. ALKIRE *et al.*, Appellants.

1. **Fraudulent Conveyances.** A sale made with the intent either to hinder or to delay creditors, is fraudulent; it is not necessary that the intent be to hinder *and* delay.
2. ———: **INSOLVENCY.** Neither insolvency of the vendor, nor knowledge thereof by the purchaser, is a necessary ingredient in a fraudulent sale.
3. ———: **VENDEE'S LACK OF CAUTION: WILLFUL IGNORANCE.** Mere want of caution in dealing with a fraudulent vendor will not implicate the vendee in the fraud. But if he knows enough of the purposes of the vendor to put a prudent man on inquiry, it will be his duty to make reasonable inquiry, and if he fails of this, he will be charged with notice of the fraud.
4. ———. Upon the sale of a stock of goods to be paid for in land, the purchaser, at the instance of the vendor, conveyed the land to the minor children of the latter. *Held*, that this did not, of itself, invalidate the sale of the goods; but if the vendor was insolvent the land might be subjected to the payment of his debts.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS,
Judge.

REVERSED.

Eads & Graham and Hale & Sons for appellants.

Waters & Wyne for respondent.

HENRY, J.—Plaintiff sued defendants for damages for the seizure by them of a stock of groceries, and, also, for taking possession of the store-room in which he conducted his business, and withholding from him the possession thereof for a period of five days, to the destruction of his said business. The answer was a general denial, and also set up, specially, that Winfrey, one of the defendants, as sheriff of Carroll county, seized the goods under writs of attachment, in favor of the other defendants, against D. Meyers & Co., and as the property of said firm. The replication denied the firm's ownership of the goods. The seizure of the goods by the sheriff under the attachment, was admitted; and it was proved that plaintiff purchased the goods of D. Meyers & Co. before the attachments were issued. There was sufficient evidence tending to prove the sale fraudulent, to warrant the court in submitting the question of fraud to the jury.

The court gave three instructions for plaintiff, attempting to define a fraudulent sale under the statute, in the first and second of which the jury were told

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that plaintiff was entitled to recover, unless the sale by Meyers & Co. was fraudulent, and made, with plaintiff's knowledge, to delay and hinder the creditors of said firm. This required them to find that the sale was made to hinder and delay, while the statute declares a sale void made with the intent to hinder or delay creditors. A sale made with either intent is a fraudulent sale, and while it is no easy matter to distinguish between an intent to

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hinder and an intent to delay, in *Burgert v. Borchert*, 59 Mo. 83, this court held an instruction similar to this, erroneous.

The second instruction is manifestly erroneous in another respect. It declares that plaintiff is entitled to recover, unless the jury should find that, at the time of the sale, Meyers & Co. were insolvent, and that the sale was made to hinder and delay their creditors, and that plaintiff then knew they were insolvent, and that the sale was made by them with the intent to hinder or delay their creditors. Whether insolvent or not, Meyers & Co. might have made a sale of their goods with the intent to cheat and defraud their creditors, and if plaintiff knew of that intent, that was sufficient to make the sale void as to creditors of Meyers & Co. It was, therefore, wholly immaterial in that aspect of the case whether Meyers & Co. were solvent or insolvent, or if insolvent, whether plaintiff knew it or not.

The court, at defendants' instance, gave seven instructions, which fairly presented the law applicable to the evidence in the cause, and refused six asked by vendee's lack of caution: willful ignorance. them. The seventh refused should have been given. It was as follows: "The jury may, in order to determine whether the plaintiff had knowledge of the fraudulent intent of Meyers & Co., take into consideration the acts and declarations of the plaintiff and Meyers, as well as all the facts and circumstances surrounding the whole transaction; and if the jury believe from the evidence that sufficient knowledge was obtained by the plaintiff to put him upon his inquiry, then the jury have the right to infer that the plaintiff had knowledge of the fraudulent character of the transaction, if they further find it was in fact fraudulent." *Bigelow on Fraud*, 288; *Bump on Fraudulent Conveyances*, 231, 232; *Warren v. Swett*, 31 N. H. 332; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Acer v. Westcott*, 46 N. Y. 384; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Woodworth v. Paige*, 5 Ohio St. 70. "A mere want

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of caution, however, as distinguished from fraudulent and willful blindness, is not sufficient to charge a purchaser with notice." 5 Ohio St., *supra*. And whether plaintiff was only incautious, or knowing enough to put a prudent man on inquiry with regard to the purposes of the vendors, was willfully ignorant of the facts which he could have learned on reasonable inquiry, was a question for the consideration of the jury.

The eighth instruction declared that if Meyers & Co. were indebted in an amount equal to or exceeding the value of the stock, and had no other property, individually or as a firm, subject to execution, and the land conveyed by Rupe was, by the direction of Meyers & Co., conveyed to the minor children of Mrs. James, one of the firm, without any consideration moving from them, the sale was void as to creditors of Meyers & Co. On those facts the creditors might have followed the land in the hands of the grantees, and subjected it to the payment of those demands, but, the fact that the land was so conveyed, did not, of itself, affect the purchase made by Rupe. If he purchased in good faith, his conveyance of the land to Mrs. James' children at the request of Meyers & Co., was in effect, a fraudulent conveyance of the land to them by Meyers & Co. The court did not err in refusing that instruction.

Such of defendants' other refused instructions as asserted correct legal propositions, were embraced in those given, and others were objectionable as comments upon evidence. As the cause will be remanded for another trial, it is proper to suggest that the verdict, if for plaintiff, should specify on which count of the petition it is found. The judgment is reversed and the cause remanded. All concur, except RAY, J., who having been of counsel, did not sit.

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KERSEY v. GARTON, *Appellant.*

1. **Attorney's Fees: PLEADING.** The petition in a suit to recover attorney's fees, failed to aver directly that the plaintiff had obtained a license to practice law. *Held*, not a defect that could be taken advantage of in arrest.
2. **Attorney and Client: CONTRACT.** If an attorney is prevented by his client from completing his employment, he will be entitled to recover his fees as if the contract was fully performed.
3. **Pleading.** Whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out.

Appeal from Greene Probate and Common Pleas Court.—HON.
T. H. B. LAURENCE, Judge.

AFFIRMED.

This was a suit for attorney's fees. The petition alleged that the plaintiffs were partners in the profession and practice of law under the firm name of Kersey & Druley; that they were employed by defendant to bring suit for certain land for a fee contingent upon success; that they had brought the suit and were prosecuting the same, when defendant refused to permit them to proceed and had the suit dismissed; and that defendant refused to pay plaintiffs any fee. The answer was a general denial. Plaintiffs had judgment. Defendant moved in arrest of judgment and for a new trial. Both of these motions were overruled and defendant appealed.

McAfee & Massey for appellant.

Boyd & Vaughan for respondent.

I.

SHERWOOD, J.—The objection that the petition does not state that either of the plaintiffs ever obtained a license to practice law, cannot be urged in arrest. The defect is

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not a fatal one, and is cured by verdict. Inferentially, at least, the allegation is made that plaintiffs were duly admitted to the bar.

II.

The declaration of law to the effect that the defendant having prevented the plaintiffs from completing their contract by dismissing his suit, they were entitled to recover as if the contract were fully performed on their part, we regard, in view of the facts in evidence, as correct and sustained by the authorities cited in behalf of plaintiffs. *McElhinney v. Kline*, 6 Mo. App. 94; *Marsh v. Holbrook*, (N. Y. Ct. App.) 3 Abb. 176; *Baldwin v. Bennett*, 4 Cal. 392; *Myers v. Crockett*, 14 Texas 257; *Hunt v. Test*, 8 Ala. (N. S.) 713. And there is much force in the view that contracts, such as the one before us, are from the nature of the engagement; from the peculiar and confidential relations existing between the parties thereto; from the fact that an attorney, when discharged by his client, is prevented from accepting employment in the same cause by the adverse party; from the fact of its being practically impossible to determine the value of an attorney's services up to the time of his dismissal, and from the fact of the impossibility of ascertaining the measure of his damages; that these circumstances should exempt such a contract from those rules which prevail in cases of contracts differing so widely in these essential particulars from that under discussion, and should fix the measure of damages at the price agreed to be paid. *Weeks on Attys.*, § 266. In the language of the supreme court of Alabama, when discussing a similar case: "It would be most unjust that the defendant, by a compromise with the adverse party, should snatch from the plaintiff the fruits of his labor, and deprive him of the power of performing his contract." *Hunt v. Test, supra*. In this case, the defendant, by compromising the suit, derived the benefit of his attorneys' services, and obtained by that compromise \$300, which the evidence of

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Rainey tended to show was the full value of the land. If so, the recovery of the plaintiffs was not as large as it should have been.

III.

There is no error in the declaration of law which excluded all evidence in relation to the title of the land concerning which the suit in ejectment was brought. The answer was simply a general denial. If the defendant, in the circumstances of this case, could have raised such an issue, a point not necessary at present to be determined, he could only have done so in the legitimate way, *i. e.*, in his answer. If he had no title to the land; if the action brought at his instance, would not have proved ultimately successful, this was a matter of defense, to be specially pleaded, the rule of the code in such cases being this: "Whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out." *Northrup v. Mississippi, etc.*, 47 Mo. 435; Bliss Code Plead., § 352. As the act of the defendant prevented performance, it is to be assumed that the service would have been performed as agreed upon. *McElhinney's case, supra*. Therefore, judgment affirmed. All concur.

TREASURER OF THE STATE LUNATIC ASYLUM V. DOUGLAS,
Plaintiff in Error.

1. A Bond payable to the "Treasurer of the State Lunatic Asylum," without naming the incumbent, is good.
2. A Bond is not void because the names of the obligors do not appear in the body of it.
3. State Lunatic Asylum: BLANK BOND. The obligors in a bond given to the treasurer of the State Lunatic Asylum bound themselves "to pay to said treasurer, or his successors in office, the sum

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of ——— dollars per week for the board of " a patient. *Held*, that the omission to fix the rate of board per week did not invalidate the bond. The law would imply a reasonable rate; and under the statute, (G. S. 1865, p. 305, § 9,) a statement certified by the superintendent of the asylum, would be *prima facie* evidence of the amount due.

4. ———: ATTORNEY'S FEE. In a suit on a bond for the board of a patient at the State Lunatic Asylum, the court is authorized to tax as costs, a reasonable fee for the attorney of the asylum.

Error to Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

This was an action to recover for the board, etc., of Mrs. Blue, a patient at the State Lunatic Asylum at Fulton. The action was on a bond signed by defendant Douglas and others, in the following form: "Know all men by these presents, that we, ———, of the county of Chariton, are held and firmly bound unto ———, Treasurer of the Missouri Lunatic Asylum, and his successors in office, in the sum of \$500, for the payment of which we jointly and severally bind ourselves firmly by these presents, sealed with our seals, and dated this 24th day of December, 1868. The condition of this obligation is such that: Whereas, Mrs. Martha M. Blue has been admitted as a patient in the Missouri State Lunatic Asylum at Fulton; Now, therefore, the condition of this obligation is, that if the said obligors shall pay to the said treasurer, or his successors in office, the sum of ——— dollars per week for the board of said patient, so long as she shall continue in the said asylum * * then this obligation shall be void; otherwise to remain in full force."

At the trial the defendant objected to the introduction of this bond in evidence, on the following grounds: (1) Because it is not made payable to any person as Treasurer of the State Lunatic Asylum, by name. (2) Because the names of the obligors do not appear in the body of the

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bond. (3) Because the amount of the board to be paid per week is not stated in the body of the bond. These objections were overruled, and the bond was admitted. Plaintiff also offered in evidence a statement of the amount due, certified by the superintendent of the asylum, and parol evidence in explanation of the several items. Defendant made the same objections to this evidence as to the bond, but the court overruled them, and gave judgment for plaintiff for the amount claimed, together with an attorney's fee.

Chas. A. Winslow for plaintiff in error.

The blank spaces left for the name of the treasurer and the rate of board should have been filled. *G. S. 1865, p. 307, § 23.* This not having been done, the bond is void. *U. S. v. Nelson*, 2 Brock. 64; *Phelps v. Call*, 7 Ired. (N. C.) Law 262; *Pelham v. Grigg*, 4 Ark. 141; *Preston v. Hull*, 23 Gratt. 600; s. c., 14 Am. Rep. 153; *Wunderlin v. Cadozan*, 50 Cal. 613; *Bishop on Contracts, § 22*; 2 *Parsons Contracts*, (6 Ed.) *563.

Kinley & Wallace for defendant in error.

The omission of the treasurer's name does not invalidate the bond. *Brittin v. Mitchell*, 4 Ark. 92; *Teris v. Randall*, 6 Cal. 632; *Hopkins v. Plainfield*, 7 Conn. 286; *Dyer v. Covington Tp.*, 28 Pa. St. 186; *Fairfax v. Soule*, 10 Vt. 154; *Fort Wayne v. Jackson*, 7 Blackf. 36; *Chapin v. R. R. Co.*, 8 Gray 575; *Charles v. Haskins*, 11 Iowa 329; *Jones v. Thomas*, 21 Gratt. 96; *Richardson v. People*, 85 Ill. 495. The omission of the names of the obligors is not fatal. *Keeton v. Spradling*, 13 Mo. 321; *Johnson v. Steamboat Lehigh*, 13 Mo. 539; *Cunningham v. State*, 14 Mo. 402; *State v. Wilcox*, 59 Mo. 176; *Ahrend v. Odiorne*, 125 Mass. 50; s. c., 28 Am. Rep. 199. Nor is the omission of the rate of board per week. 2 *Parsons Contr.*, (6 Ed.) 553; *Abbott's Trial Ev.*, 294, 295, 527, 528; *Robinson v. U. S.*, 13 Wall.

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363; *Moore v. Meacham*, 10 N. Y. 208; *Agawam Bank v. Strever*, 18 N. Y. 502; *Heinnemann v. Rosenback*, 39 N. Y. 98; *Blossom v. Griffin*, 13 N. Y. 569; *Harman v. Howe*, 27 Gratt. 676; *Whitney v. Darrow*, 5 Oregon 442; *Supervisors v. Pabst*, 45 Wis. 311; *Letcher v. Letcher*, 50 Mo. 137; *Chambers v. Board of Education*, 60 Mo. 379; *Rollins v. Claybrook*, 22 Mo. 407; *Moss v. Green*, 41 Mo. 389; *Briggs v. Munchon*, 56 Mo. 467; 1 Greenleaf Ev., § 277, 284 a.

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There is nothing in the point that the name of the treasurer is not inserted in the bond.

Equally untenable is the objection that the names of the obligors are not inserted in the body of the bond. As shown by the authorities cited by plaintiff, this point is well settled in this State.

Now, as to the blank left in the bond in respect to the board of Martha M. Blue. It seems from the authorities that if the blank is caused by an omitted word or words, which being omitted, the instrument would have no legal existence, that then, parol, or oral evidence, is incompetent to supply such omission, and the defect is fatal. 2 Parsons Contr., 563. But there is no doubt that where the defect is not of such a serious character, and where, as here, it appears that the whole contract was not reduced to writing, and the writing does not purport to be a complete expression of the intention of the parties, that is to say, of the entire contract, but only a part thereof is reduced to writing, that in such case the portion thus omitted, the intention thus remaining unexpressed, in writing, may be supplied by parol. *O'Neil v. Crain*, 67 Mo. 250, and cases cited. The bond in the case at bar, shows incompleteness upon its face, in regard to the compensation to be paid for the board of the patient. There would seem to be no room to question that the obligors bound themselves to pay for the board of the patient, and if they failed

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to contract respecting the rate, the law would imply a reasonable one. In this case, however, judging from the items of credit in the account, there was no misunderstanding as to the amount to be charged for board. And under the statute, the account officially certified by the superintendent as to the amount due is *prima facie* evidence of such amount. Gen. St. 1865, p. 305, § 9. And no objection was taken as to the sufficiency of the certificate here.

So far as concerns the attorney's fee demanded in the petition, the statute, (Gen. St. 1865, p. 312, § 49,) authorizes the court in any suit instituted in behalf of the asylum to assess and tax as costs a reasonable attorney's fee.

This case was tried conformably to the theory heretofore announced, and judgment affirmed. All concur.

FORRESTER V. MOORE, *Plaintiff in Error*.

1. **Fraudulent Conveyances.** A preference among creditors will not be held invalid for fraud on the part of the debtor alone. It must appear that the preferred creditor participated in the fraud.
2. — : INSTRUCTIONS AS TO BONA FIDES. The *bona fides* of a transfer of personalty being in issue in this case, the court instructed the jury that in determining the question they should "consider all the facts and circumstances detailed in evidence." *Held*, that this was proper and sufficient, and the party alleging fraud was not entitled, under the conditions of this case, to instructions specifying in detail what facts or groups of facts were badges of fraud.
3. — : MORTGAGE. A debtor conveyed land to a trustee for the benefit of one of his creditors. Afterward the creditor consented that the land should be exchanged for a portable saw mill, on condition that the title to the mill should be vested in him, but the defendant should have possession of it, operate it and out of its earnings pay the creditor's demand. There was no agreement as to who should own the mill after the debt should be paid. The exchange was effected, a bill of sale for the mill taken in the name of the creditor, and the mill placed in possession of the debtor. *Held*, that the transaction did not amount to a mortgage of the mill, so as

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to require the bill of sale to be recorded, in order to be valid against other creditors of the debtor under section 8, page 281, Wagner's Statutes. Neither could it be regarded as a gift or sale by the debtor within the meaning of section 4, page 280, or section 10, page 281, Wagner's Statutes.

4. **Resulting Trusts.** The evidence essential to the creation of a resulting trust, must show the contract clearly and unequivocally, so as to leave no room for reasonable doubt.

Such a trust will arise in favor of a third party when he furnishes the purchase money and the party in whom the title is placed is a mere volunteer.

5. **Fraudulent Conveyances.** Only subsequent creditors can question the validity of a claim to personalty in the possession of a debtor by a third person, on the ground that the evidence of the latter's title is not recorded.

Error to Schuyler Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Higbee & Shelton for plaintiff in error.

Knott & Caywood for defendant in error.

PHILIPS, C.—This is an action of replevin instituted in 1877 by Forrester, the defendant in error, to recover the possession of a portable saw mill of the alleged value of \$1,000. Moore was the acting sheriff of Schuyler county, and as such had levied on this mill as the property of one Wm. Buford, under several writs of *fi. fa.* issued on judgments in favor of different creditors against the partnership firm of Gray and others, of which Buford was a member.

Defendant's answer tendered the general issue, except as to his possession, and then justified under the writs of execution, and averred that the mill, at the time of the seizure, was in Buford's possession, that Buford was the owner thereof. On the trial, Buford testified that the mill belonged to plaintiff; that in 1872 he owed plaintiff a note for \$1,550, and in 1873, finding his firm to be in failing

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circumstances, in order to secure plaintiff, he deeded to his son, who was also plaintiff's son-in-law, 120 acres of land in Putnam county. In 1875, the plaintiff consented that said land might be traded to one Shively for the mill in question, if Buford would take the mill for him and run it.

The bill of sale therefor was made to plaintiff, and Buford took the same to run it with the privilege of paying off the note of \$1,550 out of the earnings of the mill if he could, or with the privilege of selling it for such purpose. He testified that it was an honest, *bona fide* sale, etc., and he was corroborated by the testimony of the plaintiff. The mill proved unprofitable. Buford had retained possession of it up to the time of seizure, as did plaintiff Buford's note. Something had been paid on the note. Plaintiff stated, *inter alia*, that when Buford should pay off the note, he supposed the mill would be his, though there was no agreement to that effect. He had paid no taxes on the mill. The bill of sale of the saw mill to plaintiff was duly acknowledged, but not recorded. This was the substance of plaintiff's evidence.

The only evidence offered by defendant was the judgments and executions under which the levy was made. They bore date in 1877.

The court, of its own motion, gave six instructions, and the defendant asked nine additional instructions, which the court refused. The jury found the issue for plaintiff, and defendant has brought the case here on writ of error. The errors complained of by defendant are the refusal of his instructions. This renders it necessary to incumber this report with their reproduction. Those given by the court are as follows:

1. The court declares, from the testimony, that the property in controversy is personal property.

2. If the jury believe from the evidence that Wm. Buford was indebted to Lewis Forrester in the sum of \$1,550, and that Wm. Buford became involved, and in

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good faith, for the purpose of better securing this debt, deeded a tract of land in Putnam county to one Henry Buford, who was the son of Wm. Buford and the son-in-law of Forrester, for the purpose of said Henry holding the aforesaid tract in trust for the benefit of Forrester, and if the jury believe from the evidence that afterward the said Henry Buford, with the consent of Forrester, deeded said land to one Shively for the mill in question, and that a bill of sale was taken for the same in the name of Forrester, the jury should find for the plaintiff.

3. Wm. Buford had a right to prefer any one or more of his creditors in good faith, although said preference may have operated to hinder and delay other creditors.

4. Although the jury may believe from the testimony, that Wm. Buford, in securing Forrester, may have intended to defraud his other creditors, still if they believe from the testimony that Forrester did not participate in such design and acted in good faith, then the preference was not fraudulent.

5. If, however, the jury believe from the evidence that Wm. Buford was insolvent or largely indebted, and for the purpose of hindering or delaying, or cheating or defrauding his creditors, he deeded the said land to Henry Buford, and afterward, for the same purpose or with the design of further carrying out said fraudulent purpose, traded said land for the mill in question, and for the purpose afterward took the bill in evidence to Forrester, then the jury should find a verdict for defendant.

6. In determining the question of the good or bad faith of the transaction, the jury may consider all the facts and circumstances detailed in evidence. The burden of proving the fraud is upon defendant.

Defendant then prayed, but the court refused to give, the following instructions:

7. If the jury believe from the evidence that Wm. Buford deeded the land in Putnam county to his son,

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Henry Buford, in fact to secure Buford's note of \$1,550 to Forrester, and that Wm. Buford traded said land, by plaintiff's consent, to Shively for the saw mill in controversy, and by Buford's direction, Shively executed the bill of sale of said mill to plaintiff, and that it was intended by plaintiff and Buford that said bill of sale should be a security for the payment of said note, and that the mill was not in fact taken as a payment on said note, and that said mill was not in fact delivered to plaintiff, but to Buford, and that Buford took actual possession of and retained said mill till levied on by defendant, under executions against Buford, then said bill of sale was in fact a mortgage, and not being recorded was void against Buford's creditors, and the verdict will be for defendant.

8. If the jury believe from the evidence that under the bill of sale, Buford, by Forrester's consent, took possession of the mill, and had power, by agreement with Forrester, to sell the same and receive the proceeds, then said bill of sale is void, and the verdict will be for defendant.

9. If the jury believe from the evidence that the bill of sale was intended in fact as a mortgage, and the mill was in fact delivered to Buford, although there may have been an understanding or agreement between Forrester and Buford, that Buford received actual possession of the mill as agent for Forrester, but that Buford was to have the use and possession of said mill for his own use and benefit, and Buford has ever since had actual possession and used and operated the same as his own, and Forrester has never had actual possession of it, such bill of sale operated as a mortgage on personal property, and not being recorded, was void against all creditors prior and subsequent to the date of said bill of sale, and the finding will be for defendant.

10. If the jury believe from the evidence that plaintiff executed an absolute deed of conveyance to his son Henry of the land in Putnam county, for the purpose of securing an indebtedness to plaintiff, and was at the time of making

such deed insolvent and unable to pay his debts, as they fell due in the ordinary course of business, such deed is a badge of fraud.

11. If the jury believe from the evidence that plaintiff, in securing an indebtedness to Forrester, conveyed the land in Putnam county, which they believe was an excessive amount of property, over and above what was sufficient to secure said indebtedness, then such conveyance raises a presumption that Buford intended to secure the use of said property to himself and baffle his creditors, and is a badge of fraud, and if they further believe from the evidence that the indebtedness of Forrester was at the time amply secure under any and all contingencies, and so known to Forrester, without the security on the Putnam county land, they will find for defendant.

12. If the jury find from the evidence that in 1870 or 1871, Buford and Reed gave Forrester a note for \$1,550, as a balance due on a sale of a farm in Schuyler county, sold by Forrester for \$4,550; that Forrester suffered said note to remain unpaid until the year 187—, when Buford voluntarily deeded the land in Putnam county to his son Henry, (plaintiff's son-in-law,) for an expressed money consideration, but in fact intending it as a security for the above mentioned note, without plaintiff's knowledge or request; that plaintiff suffered said note to remain unpaid until September, 1875, when, at Buford's request, the said land was traded to Shively for the saw mill in question, and that plaintiff has suffered said note to remain unpaid to the present time, and has taken no steps to collect said note, and that Buford has been insolvent all that time; then, all such transactions are badges of fraud, and circumstances for the consideration of the jury, and unless plaintiff has shown to the jury, by a preponderance of the evidence, that all such transactions are fair and honest, and in good faith, and that such delay in enforcing the collection of said note has not been, in whole or in part, for the purpose of enabling Buford to cover up or conceal his property and

withhold it from the reach of his creditors, then the finding will be for defendant.

13. The court declares that the fact that a bill of sale was executed for the mill from Shively to Forrester; that it recited a consideration different from that actually paid for it, and the fact that the bill of sale has not been recorded, are each badges of fraud, and raise a presumption in law that such transactions are fraudulent, and unless plaintiff, by a preponderance of the testimony, satisfies the jury that the bill of sale was taken in good faith and for an honest purpose, and the consideration recited therein was not varied from the true consideration for the purpose of deceiving any of Buford's creditors, or for any dishonest purpose, or that Forrester has not omitted to have said bill of sale recorded for any purpose of giving Buford a false or fictitious credit or of aiding Buford in concealing his property, or for any unlawful purpose, then the finding will be for defendant.

14. If the jury believe from the evidence that the bill of sale was intended as a security for the \$1,550 note, but that at the date of said bill of sale Wm. Buford was in embarrassed circumstances, and then indebted to the parties mentioned in defendant's answer, or either of them, and that judgment was rendered upon any of such indebtedness as mentioned in said answer, and that any of such judgments remain unpaid, and that said bill of sale was based upon any understanding, either express or implied, that Forrester would suffer the payment of said note to be indefinitely postponed, then the court instructs the jury that said bill of sale was not intended as a *bona fide* security of said note, and the finding will be for defendant.

15. If the jury believe from the evidence that, at Buford's instance, Shively executed the bill of sale read in evidence to Forrester, and that said bill of sale was intended by Buford and Forrester as a mortgage of said mill, or as a security for the payment of said note, then the fact that said bill of sale is absolute upon its face, and

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that it fails to show upon its face that it was a mortgage or security for the payment of such note, is a badge of fraud, and raises a presumption in law that such bill of sale was fraudulent and designed by Buford and Forrester to cheat and defraud the creditors of Buford, and unless the plaintiff has shown the jury, from the evidence in this cause, that the failure to have said bill of sale recite the true purpose for which it was held by plaintiff, and that upon the payment of said note the title to said mill should vest in Buford, was not from any purpose of deceiving any of the creditors of Buford or for any purpose of enabling Buford to cover up or conceal said property or withhold it from the reach of his creditors, then the finding will be for defendant.

The great number of instructions asked in this case illustrates a growing fault in the practitioner. The interminable multiplication of instructions not only incumbers the record in a cause, and unnecessarily burdens the trial and appellate courts with their examination and analysis, but if given as requested, would often confound and bewilder the triers of the facts, instead of aiding and enlightening them as designed by the law. In a case like this, where the issues are few and simple, it is not perceived why all the controlling questions of law arising, could not be intelligibly presented in a few declarations. It was, no doubt, under the commendable impulse of this view of the proper practice that the learned trial judge refused defendant's instructions *in toto*, after fairly presenting, as he conceived, the real issues.

The instructions given by the court, taken as a whole, were a fair presentation of the law of the case. If there is any error in them it is in the fifth, and in defendant's favor. It, in effect, told the jury that if, in the transaction in question, Buford had acted in bad faith toward his creditors, and designed to defraud them, they should find for defendant. This authorized a verdict for defendant, although the plaintiff's debt may

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have been *bona fide*, and his conduct free from fraud, and without participation on his part in the fraudulent act and intent of Buford. It is not sufficient to avoid a preference of one creditor that the debtor should design to hinder or delay or defraud his other creditors, but it must appear that the preferred creditor participated in some way, in that evil design, or was not acting from an honest purpose to secure his own debt. *Shelley v. Boothe*, 73 Mo. 77.

It is too obvious to demand any particularization that many of defendant's instructions are commentaries on the evidence. This objection his learned counsel seeks to parry by the suggestion that in a case of fraud, where so many concurring incidents constitute the fact in law, it is proper and just to the party holding the affirmative, for the court in instructions to declare what are badges or indicia of fraud, and by grouping them together, enable the jury to see intelligently the effect in law of the facts in evidence. The language of HENRY, J., in *Zimmerman v. Hann. & St. Jo. R. R. Co.*, 71 Mo. 491, is cited, in which it is said: "Instructions of that character are far more satisfactory guides to the jury than those which deal in vague generalities," * * leaving "them at sea, each one to determine for himself what such care and caution is."

Principles of law and rules in practice, while they should have an unvarying character, and be as guide-boards at all times, yet care must ever be vigilantly exercised to limit their proper application. They must be just so flexible as to recognize the reasonable differences in the legal status and qualities of cases as they arise. For instance, because in a given class of cases, and under peculiar phases of facts incident to them, it is permissible to array these facts in an instruction and declare to the jury the result which the law attaches to such facts when proven, counsel must not conclude that under the sanction of the language employed therein by the court license is given to indite legal essays or inject an argument to the jury in an instruc-

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tion. *Mathews v. St. Louis Grain Elevator Co.*, 59 Mo. 474. Lord Coke said: "With respect to the question of law, the jury must not respond, but only the judges. So, or in like manner, or under like restrictions, the judge must not respond to questions of fact, but only the jury." It is the recognition of this province of the jury that has so repeatedly and persistently induced our courts to pronounce against instructions commenting on the evidence, or singling out one or more facts of the case and directing the attention of the jury that way—and this for the reason that such instructions unduly influence from the bench the judgment of the jury, and tend to substitute for their estimation and analysis of a given fact, the mental and moral bent of the judge. If this may be done in one case, it can in another, until the judge from the bench will invade the jury box and displace the twelve triers of the facts.

It is proper enough, as in the case above cited presenting two affirmative phases of negligence, one on the part of defendant, and the other on the part of plaintiff himself, to declare in terms to the jury the legal effect of facts in proof as establishing the one negligence or the other. As in such cases the plaintiff usually has instructions declaring to the jury if they find this and that fact, it will amount to negligence, and authorize a recovery, so the defendant, in a proper case, is entitled to a like instruction, declaring what acts and conduct on the plaintiff's part will constitute contributory negligence and prevent a recovery.

In the case under review the question at issue was: Did the mill, at the time of the levy, belong to the plaintiff? If it did, that made out his case. In the instructions given by the court, the attention of the jury was plainly enough directed to the leading facts of the whole transaction; and they were told that, in determining the good or bad faith of the parties, the jury were to "consider all the facts and circumstances detailed in evidence." This was proper and sufficient. *Ragsdon v. Trumbo*, 52 Mo. 35; *Jones v. Jones*, 57 Mo. 138; *State v. Smith*, 53 Mo. 267; *Rothschild v. Am.*

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Cent. Ins. Co., 62 Mo. 356. Under these instructions the jury must have found that Buford was *bona fide* indebted to plaintiff on the note in question; that the land in Putnam county was conveyed by Buford to his son in good faith for the sole purpose of securing to plaintiff the said debt; that the land, with plaintiff's consent, was exchanged for the saw mill, and the title to the mill was placed in the plaintiff as the *bona fide* owner, free from fraud and collusion between him and Buford. This is all the law exacts.

Defendant claims that the seventh instruction should have been given, because he was entitled, under the evidence, to have the question passed on whether or not the bill of sale to plaintiff for the saw mill was not, in fact, a mortgage as between him and Buford, and not having been recorded, it was by operation of section 8, page 281, Wagner's Statutes, void as to Buford's creditors. There is at first view merit in this position. If the mill had been conveyed direct from Buford to plaintiff, with the express agreement that it was merely as security for the debt, possession of the property remaining with Buford, it would have been in effect a mortgage. The test as to whether it is a mortgage or sale, is, if the relation of debtor and creditor continues, and the debt still subsists between the parties, it is a mortgage. *Slowey v. McMurry*, 27 Mo. 113. Inasmuch as there were facts developed on the trial tending to show that the plaintiff still held Buford's note, and that the plaintiff would convey the mill to Buford on payment of the note, there was color of a mortgage arrangement.

But let us get back of this curtain, and see if it be not illusive. The bill of sale came not from Buford. He never owned this property. True, it was bought with land owned by Buford; but the jury have found the fact to be that this land was held by a third party in trust for plaintiff, and that plaintiff consented that this trust property, of which he was the beneficial owner, might be sold

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by the trustee on the express condition that the mill should be taken in exchange, and the absolute title put in him, if Buford would take charge and run it, and out of the proceeds of its earnings enable plaintiff to realize his money. By that transaction plaintiff became the owner and Buford his bailee, from whom the plaintiff might, at any time he deemed fit, have demanded the possession.

And it is in this connection and light that we must interpret the language extracted from the plaintiff on cross-examination: "I hold it as security for the 4. RESULTING TRUSTS. note, though there was no agreement of that sort." Under such proof could Buford have maintained an action for redemption? The fact that the plaintiff may have designed in his own mind to permit Buford to redeem was not sufficient. It must have been communicated and assented to, to constitute the contract. The evidence essential to the creation of resulting trusts must show the contract, clearly and unequivocally, so as to leave no room for reasonable doubt. *Ringo v. Richardson*, 53 Mo. 385, *Kennedy v. Kennedy*, 57 Mo. 73. The title having, by express agreement, on a consideration moving from the plaintiff, been placed by Shively in him, no resulting trust could arise in favor of a third party. Such trusts only arise in favor of such third party where he furnishes the purchase money and the party in whom the title is placed is a mere volunteer. Story Eq., § 1201 a; Perry on Trusts, § 143.

Nor has the 4th nor 10th sections of Fraudulent Conveyances, (Wag. Stat., p. 281,) any application to the facts of this case. Buford never sold this property to plaintiff. He never had possession of it except as the bailee or agent of the plaintiff.

Some of the defendant's instructions raise the question that the possession of the mill by Buford without any record evidence of plaintiff's title, was a 5. FRAUDULENT CONVEYANCES. badge of fraud, or rather was calculated to operate as a fraud upon creditors of Buford. There would

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be much force in this suggestion had it been alleged in the answer and proved on the trial that the judgment creditors had dealt with Buford on the faith of his possession and supposed ownership of this property. But there is no such issue tendered by the answer, although it entered into special matter of defense; and if the issue had been properly raised there is no evidence in the record to sustain it. On the contrary, the bill of exceptions shows affirmatively that the debts represented by the judgments under which the mill was seized by defendant, were contracted in 1872, three years before the mill was bought of Shively, or Buford ever had possession of it. How then can it be claimed that Buford obtained any credit on the faith of his ownership of the mill?

The case seems to have been fairly tried, the judge responded to the law, and the jury to the facts. The judgment of the circuit court is, therefore, affirmed. MARTIN, C., concurs; WINSLOW, C., absent.

LOGAN V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Railroads: DAMAGES FOR THE EJECTION OF PASSENGERS: PLEADING.** In an action based upon an alleged unlawful removal of plaintiff from defendant's train, he cannot recover damages for the manner in which it was effected, if it is found to have been justifiable.
2. ———: **JUNCTION WITH ANOTHER ROAD: STATUTES: PASSENGERS.** A railroad company owes no duty to a passenger on its road to stop the train at a station because a junction is there made with another road, unless he desire to be transferred to a train on such other road, in which case alone the statute, (G. S., p. 340, § 29,) is applicable.
3. ———: **PASSENGERS: TICKETS.** A railroad company owes no duty to a passenger to stop the train at a station where, by its rules and regulations, such train is forbidden to stop, by reason of the mere fact that he has purchased a round trip ticket from such station to

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another, and on his return presents the same to the conductor and demands that the train should be stopped at such station.

4. ——— : ——— : ——— : PLEADING. Where a petition alleged that the plaintiff entered a train by virtue of a round trip ticket from one station to another and return, and this allegation was denied by the answer, it was *held* that it might be shown that under the rules and regulations of the company, plaintiff had no right by reason of such ticket to enter such train, and that he was so informed by defendant's agent when the ticket was purchased; that such evidence was relevant to the issue, such ticket not purporting to be a complete contract; and that it was not necessary to such issue that the rules and regulations should have been pleaded. *Hicks v. H. & St. Jo. R. R. Co.*, 68 Mo. 329, distinguished.
5. ——— : EXEMPLARY DAMAGES FOR THE EJECTION OF PASSENGERS. A passenger is not entitled to exemplary damages for an ejection from a railroad train where the conductor acts in good faith, with no malice to the passenger, and uses only such force as is necessary for his removal, although he may be mistaken as to his duty and the plaintiff's rights.
6. ——— : PASSENGER REFUSING TO PAY FARE. A passenger refusing to pay fare beyond a certain station, at which he has no right to require the train to be stopped, may, before such station is reached, be lawfully removed at the station nearest thereto at which, under the company's regulations, such train is permitted to stop.
7. SEPARATE OPINION BY NORTON, J., concurring, upon the sole ground of error by the trial court in refusing to receive evidence that plaintiff, after purchasing his ticket and before entering the train, was informed by defendant's agents that it did not entitle him to ride in the train from which he was ejected.

Appeal from Livingston Circuit Court —HON. E. J. BROADDUS,
Judge.

REVERSED.

Geo. W. Easley for appellant.

L. H. Waters for respondent.

HENRY, J.—By this action plaintiff seeks to recover damages for his ejection from a train of defendant's cars, at Chillicothe, he having purchased a ticket from Laclede, east of Chillicothe, to Kansas City and return. The ticket

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was purchased on the 8th day of August, 1876, and it was on his return that he was removed from the train. The facts, as disclosed by the record, are, that after the train left Kansas City, at the North Missouri Junction, the conductor informed plaintiff that he had taken the wrong train, that he should have taken the morning train, that his train did not stop at Laclede, and he could not let him off there, but would let him off at Chillicothe west, or Brookfield east of Laclede, from which latter station he could return that night on another train; that plaintiff insisted on his right to be carried to and let off at Laclede. When the train reached Chillicothe, plaintiff, still insisting upon his right to be carried to and let off at Laclede, and refusing to get off at Chillicothe, or to pay fare to Brookfield, was ejected from the train.

There was testimony tending to prove that the conductor was insolent to plaintiff, and that more than necessary force was used to put him off. It was also shown that the defendant's road and the Chicago, Burlington & Southwestern Railroad formed a junction at Laclede. The defendant offered evidence, which the court excluded, to show what the rule of the company was at that time with regard to round trip tickets, and that under the rule, train No. 4, on which plaintiff took passage, was not permitted to stop at Laclede, and that when plaintiff purchased his ticket, the agent informed him that he must not get on that train to return, because it did not stop at Laclede. The defendant also offered the defendant's time table, showing that train No. 4 was not permitted to stop at Laclede at the time plaintiff purchased his ticket, which was also excluded. The trial resulted in a judgment for plaintiff for \$1,200, from which this appeal is prosecuted.

Apart from the ejection of plaintiff from the train, the other behavior of the conductor, of which he complains, constituted no cause of action against the defendant. It could only be considered in aggravation of damages in connection

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with an unlawful removal of plaintiff from the train. If his ejection was lawful, then, even if more force and violence than necessary were used, plaintiff cannot recover in this action, because it is based upon an alleged unlawful removal of plaintiff from the cars. *Johnson v. R. R. Co.*, 46 N. H. 213. If his removal was justifiable, and he would recover damages for the improper manner in which it was effected, such should be the cause of action alleged in his petition.

The case, therefore, turns upon the question of the conductor's right, and duty to the company, to put plaintiff off at Chillicothe. It is contended that inasmuch as defendant's road and the Chicago, Burlington & Southwestern Railroad formed a junction at Laclede, it was the duty of defendant, under section 29, General Statutes, 340, to stop all its passenger trains at Laclede to enable passengers to get on and off. That section has no application to passengers, other than those who desire to transfer from a train on one of the roads to a train on the other. That is the language of the section, and it can be invoked against the company in behalf of no one except a passenger who wishes to make such a transfer. A passenger whose destination is Laclede may take the chance of such a stoppage, if there are others on the train who desire to transfer but the company owes him no duty to stop there for his accommodation.

With respect to plaintiff's right to have the train stop at Laclede to let him off, Thompson in his work on Carriers of Passengers, page 65, says: "A ticket cannot be said to be either the contract or to contain the contract. The settled opinion is, that it is a mere receipt, taken, or voucher adopted for convenience to show that the passenger has paid his fare from one place to another. A contract for transportation may therefore be proved independently of the terms of the ticket." At page 66, he says: "It is the duty of the passenger to as-

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3. —: passen-
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certain what train will stop at his destination. Therefore a passenger who purchased a ticket to a station at which local trains stopped, but through trains did not, was not entitled to enter the first train due after he purchased his ticket, and demand of the conductor that it stop at his station, when by the regulations of the company, it was not permitted to do so, as it was a through train." That "railroad companies may make reasonable regulations as to the mode of their performance of their duties as carriers of passengers," is well settled. *Johnson v. R. R. Co.*, 46 N. H. 213; *Cheney v. R. R. Co.*, 11 Met. 121; *Cleveland, etc., R. R. Co. v. Bartram*, 11 Ohio St. 457; *Pittsburg, etc., R. R. Co. v. Nuzum*, 50 Ind. 141. In the latter case it was held that: "The duty of the railroad company to the public requires that she should run her trains according to her rules and regulations, without infringing them to accommodate a single passenger," and that "it is the duty of a person about to take passage, to inquire when, where and how he can go, or stop, according to the regulations, and if he makes a mistake, not induced by the agent of the company, he has no remedy."

A railroad operated at random, without fixed rules and regulations to be observed in its management, would be a nuisance and a terror to the country through which it might pass. The probability that innumerable accidents and injuries would result from such a reckless mode of moving trains, requires the adoption and strict enforcement of reasonable regulations for their operation and management. A departure from such rules and regulations which should occasion an injury to a passenger who is presumed to take passage with reference to them, would render the company liable to such passenger in damages; and this liability cannot co-exist with the right of a passenger to have the train stop at a station at which, by the regulations of the company, such train is not permitted to stop. The court erred in refusing to permit the defendant to prove the rules and regulations of the company and the informa-

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tion given to plaintiff by the ticket agent when plaintiff purchased his ticket.

Nor was it necessary that the rules and regulations should have been pleaded. *Farmers & Mechanics' Bank v. ———*; *———*; *Transportation Co.*, 16 Vt. 52; Lawson on *———*; pleading. Usages and Customs, 133. The petition alleges that plaintiff entered the train "by virtue of his ticket," and the answer denied all the allegations in the petition. "That plaintiff entered by virtue of his ticket," was denied, and the evidence excluded was relevant to that issue. The ticket was not the contract for transportation, and on the authorities above cited, the defendant had the right to show that under the contract for transportation, plaintiff had no right to a passage to Laclede on that train. The evidence offered, if admitted, would have tended to disprove the entire cause of action stated by plaintiff in his petition.

Hicks v. Hann. & St. Jo. R. R. Co., 68 Mo. 329, is cited as announcing a different doctrine. The allegation of the petition in that case was that: "Mrs. Hicks and her two infant children were received by defendant into its passenger train at Kansas City, to be carried to Utica, she having purchased a ticket for passage between said points." This was specifically denied. The testimony for plaintiff was that the agents of defendant, after she purchased her ticket, told her to take that train and assisted her and her children to get aboard. The evidence excluded was, that that train, under the rules of the company, was not permitted to stop at Utica. It was wholly immaterial what the rules of the company were, with respect to that train, if the agent of defendant told Mrs. Hicks to take passage on it for Utica, and the evidence excluded, if not supplemented by other testimony contradicting that of plaintiff as to the conduct of the agents at Kansas City, could not have changed the result, and its exclusion could not have prejudiced the defendant. But if it was competent for plaintiff to prove that she was told by the agent that she should take that

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train, we cannot see why, upon principle, it was not competent for defendant, not only to contradict that evidence by direct proof that such information was not given, but by any evidence tending to show that her ticket did not entitle her to passage on that train.

The instructions Nos. two, three, five and seven, asked by defendant and refused, should have been given. Nos.

5. —: exem-
plary damages for
the ejection of
passengers.

two, three and seven declared the law as herein announced, and No. five declared that the jury should not award exemplary damages, unless the defendant's employes used more force than necessary to eject plaintiff from the train, or acted from a willful and malicious spirit, intending to wrong and injure him, and outrage his feelings. The plaintiff had been told that he would not be let off at Laclede, and must leave the train at Chillicothe. If he had done this, he could have maintained his action against defendant, if he had the right he claimed. By refusing to do so he subjected himself to the mortification he suffered from being publicly removed from the train, and that is not a matter to be considered in such a case in estimating his damages. *Chicago, Burlington & Quincy R. R. Co. v. Parks*, 18 Ill. 460. If the conductor acted in good faith, with no malice toward plaintiff, and used only such force as was necessary to eject him, although mistaken as to his duty and plaintiff's right, it is no case for vindictive damages. *Fink v. Alb. & Susq. R. R. Co.*, 4 Lansing 147.

The first instruction given for plaintiff is erroneous. It declares that "if plaintiff had a ticket to Laclede, the defendant's conductor had no right to put him off his train, until the train had passed Laclede station, and plaintiff had refused to pay his fare to the next station at which the train would stop." This would compel the conductor to carry him beyond the point to which he had paid fare. He had no legal right on that ticket to a passage for any distance beyond the station to which he had paid his fare. If he was lawfully ejected

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ger refusing to pay
fare.

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he had no right to be carried on that train to Laclede. If he had paid or tendered the fare from Laclede to Brookfield, the conductor had no right to remove him from the car, but refusing to pay the additional fare at Chillicothe, the only station west of Brookfield at which he was permitted to stop the train, the conductor had a right to put him off at that station. If the conductor was not permitted to stop at any station or elsewhere between Chillicothe and Brookfield, could the plaintiff, by his own wrong, compel him to stop between Laclede and Brookfield? He must either stop at a place or station where he is forbidden to stop by the regulations of the company, or without additional fare, carry plaintiff to Brookfield, the next stopping station.

The judgment is reversed and the cause remanded.

NORTON, J.—I concur in the result of the above opinion upon the sole ground that the court erred in refusing to permit defendant to show that plaintiff, after the purchase of his ticket and before he entered the train in question, was informed by the agents of defendant that it did not entitle him to ride or take passage on the train from which he was ejected.

THE STATE *ex rel.* JONES, *Appellant*, v. MARTIN.

1. **Execution: OFFICER'S LIABILITY FOR LEVYING: PLEADING.** A sheriff is liable for an excessive sale, but not in an action wherein the petition charges only a wrongful levy, seizure and detention of the goods.
2. **Fraudulent Conveyances.** Where father and son combined together to defraud the creditors of the father by a transfer of his goods to the son, and the father afterward added other goods bought on credit in the name of the son, to the stock. *Held*, that these goods were liable for the debts of the father, notwithstanding the son was liable for the price of them.

Appeal from Livingston Circuit Court.—HON. E. J. BROADDUS,
Judge.

AFFIRMED.

Shanklin, Low & McDougal for appellant.

Hicklin & Yates with *Hollister* for respondent.

PHILIPS, C.—This is an action brought by James T. Jones against Martin, as sheriff of Daviess county, and the sureties on his bond, for damages, tried on change of venue in Livingston county. The breach of the bond assigned is, that one Hunter having obtained against Theophilus Jones a judgment for \$1,916, Martin, as such sheriff, “without leave and wrongfully levied upon, seized, etc., as the property of said T. Jones,” the goods and merchandise set out in the petition, of the value of \$5,850, which were the “property of the relator, and has not returned the same or any part thereof.” The answer took issue as to the value of the goods, and denied that they were “of any greater value than \$2,500.” The answer claimed that the goods were the property in fact of said Theophilus, who was the father of the relator, and that the relator’s claim to said goods was fraudulent as to the creditors of said Theophilus, and especially as to said Hunter.

The evidence showed that the father of the relator owned in fact a hotel, which he traded, and took in exchange therefor a stock of goods estimated to be worth about \$2,500. These goods were placed in the name of the relator, and the business was conducted in his name. But the father managed the entire concern, bought all the goods, and the evidence was such as to leave no doubt in any unprejudiced mind that the father was the real party in interest, that his object in employing his son’s name was to defraud Hunter, and that his son was privy thereto. The stock of goods were, from time to time, replenished

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by the father, but the goods were bought in the name of the son.

The sheriff, Martin, having testified on behalf of the defense, the following occurred :

On cross-examination plaintiff's counsel put to witness the following question : " Did you not levy upon and sell several hundred dollars' worth of goods over and above enough to satisfy the execution in your hands ? " Which question was objected to by defendant's counsel as irrelevant, which objection was sustained by the court.

Plaintiff's counsel then asked the following question : " Did you not sell from \$500 to \$600 worth of goods after you had sold enough to satisfy the execution in your hands ? " To this question the defendant's counsel objected as irrelevant, which objection was sustained by the court.

Witness then testified : " I sold all the goods in the store, both boxed and unboxed. I sold some that were boxed up for about \$130. "

Plaintiff's counsel then asked the following question : " How much money did you receive for all the goods sold ? " Which was objected to by defendant's counsel as irrelevant, which objection was sustained by the court.

Witness then testified : The queensware had not been taken out of the box. I sold that box, I think, for \$130. I tendered back some of the goods after the sale to the plaintiff. He refused to receive them.

Plaintiff's counsel then asked the witness the following question : " Did you ever tender or offer to return any money that you had received on the goods sold over and above the satisfaction of the execution in your hands ? " Which question was objected to by defendant's counsel as irrelevant, which objection was sustained by the court.

Witness then further testified : " A small lot of the goods levied on were not sold. I offered them back. I offered to deliver them back to all three—Theophilus, James T. and George. They would not accept them. "

Plaintiff prayed the court to instruct the jury as follows:

1. If the jury find from the evidence that defendant Martin, as sheriff, levied upon and sold goods purchased by James T. Jones, they must find for the plaintiff as to such goods.

2. Unless the jury find from the evidence that Theophilus Jones, with intent to hinder, delay or defraud his creditors or said Hunter, conveyed or caused the stock of goods in controversy to be conveyed to James T. Jones, the jury must find for the plaintiff the value of the stock of goods seized and sold.

3. Theophilus Jones, even though insolvent, could rightfully sell or dispose of his property in payment of his debts; and he had a right to prefer his son as a creditor, if he was a creditor. [Provided he did not thereby intend to defraud, hinder or delay his creditors.]

4. The burden of proof is upon defendant to show that all the property seized by the sheriff and here in controversy was by Theophilus Jones transferred or caused to be transferred to James T. Jones for the purpose of hindering or delaying the creditors of Theophilus Jones, and that James T. Jones intended thereby to hinder, delay or defraud the creditors of Theophilus Jones.

5. If the jury find from the evidence that a portion of the goods in controversy were purchased by James T. Jones on his own credit, and that no property of Theophilus Jones was used in payment therefor or in purchasing the same, the jury must find for plaintiff as to such goods so purchased.

6. If the jury find from the evidence that plaintiff's mother and grandfather, or either of them, gave to plaintiff any bonds, bills, notes or other valuable things as his own, then said notes or property and the interest thereon, so received by him, was and is his sole and individual property, and he could claim the same at any time, although

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he was not at the age of twenty-one years when said notes or other property were so given him.

8. Although the jury may find from evidence that there was an attempt on part of Theophilus Jones to defraud his creditors, and that James T. Jones knew of it, still the jury are instructed that the property after acquired by James T. Jones, of other merchants, and for which he still owes, could not be affected by said fraud, and the jury will find for the plaintiff in such sum as they may find from the evidence James T. Jones had in said store, so purchased of other parties as aforesaid.

9. If the jury find from the evidence that defendant levied upon and sold any more goods than the execution called for, he became a trespasser from the beginning, and the jury must find for the plaintiff the amount of goods sold, at their actual cash value after said execution was satisfied.

10. Although the jury may find that Theophilus Jones sold said hotel property to his son with intent to hinder and delay his creditors, still the jury will find for plaintiff the entire amount of the sale of said property so seized and sold by defendant, unless defendant has satisfied the jury by a preponderance of the testimony that plaintiff knew of said fraudulent design on the part of his father, and purchased said stock of goods for the purpose of enabling him to carry out said design.

Of which said instructions the court gave those numbered one, two, four, five, six, seven and ten, as asked, and modified the third by adding the clause which is included in brackets, thus [] and refused to give Nos. eight and nine.

The defendant's counsel then prayed the court to instruct, and the court did instruct the jury as follows:

1. If the jury find that at the time of the transfer of the hotel property from Theophilus to James T. Jones, Theophilus was in failing circumstances and involved in debt, and was indebted to Samuel D. Hunter, and that such

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transfer was made as the result of a fraudulent understanding between said Jones and Jones, with the intent to prevent the collection by Hunter of his debt against Theophilus Jones, then such transfer was fraudulent and void as to said Hunter, even though James T. Jones may have paid to his father the full and actual value of said hotel in cash.

2. If the jury find that the transfer of the hotel property from Theophilus to James T. Jones was void as to Hunter, then all property acquired by the trade or sale of such hotel thereafter will be held in law as the property of Theophilus Jones, and if the jury find that the stock of goods in question was obtained by a sale or trade of the hotel property, and find that the transfer from Theophilus to James T. Jones was void under the instruction just given, then such stock of goods and all goods added in the usual course of business by said Theophilus Jones, will be considered in law to be the goods of Theophilus Jones.

The jury found the issues for the defendants, and plaintiff appealed.

The plaintiff seeks a reversal of the judgment on account of the action of the circuit court in refusing to permit him to show that the sheriff sold more goods than were necessary, and in refusing the eighth and ninth instructions asked by him.

1. EXECUTION: officer's liability for levying: pleading.

There is no question but that it was the plain duty of the sheriff, the instant he had sold goods sufficient to satisfy the execution and costs, to have ceased selling. He could pass no title against the owner to any property sold after the satisfaction of the writ. *Durette v. Briggs*, 47 Mo. 361, and cases cited. But it does not follow from this that the plaintiff was entitled in this action to recover the alleged excess. No such issue was presented in his petition. The breach assigned was, that the sheriff had "wrongfully levied upon and seized * * the property of the relator, and has not returned the same or any part thereof." No

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lawyer would understand from this, in drawing his answer and preparing his evidence, that it was an action to recover the excess of goods wrongfully sold by the sheriff after satisfying the execution. The whole gravamen of the complaint is, that on an execution against Theophilus Jones the sheriff had seized the goods of James T. Jones, and had not returned them. The issue made by the pleadings plainly and simply was, whether the goods were subject to seizure for the debt of T. Jones. Under our system of pleading requiring "a plain and concise statement of the facts constituting a (the) cause of action," no proof can be offered of essential facts not alleged. *Frazer v. Roberts*, 32 Mo. 461; *Kiskaddon v. Jones*, 63 Mo. 190, 192; *Ferguson v. Ferguson*, 2 Comst. (N. Y.) 361; *Kelsey v. Western*, 2 Comst. (N. Y.) 506.

Nor can a plaintiff sue for one cause of action, such as a wrongful levy on the goods of A, under a writ against the goods of B, and recover as for an excessive levy or sale. This rule of pleading has been emphasized by repeated decisions of this court. *Buffington v. A. & P. R. Co.*, 64 Mo. 246; *Waldhier v. Hann. & St. Jo. R. R. Co.*, 71 Mo. 514; same case on rehearing, p. 517. Material facts should be distinctly averred and not left to inference; nor can there be any intendment in favor of an issue which the pleader has failed to specify. *Cook v. Putnam Co.*, 70 Mo. 668. Indeed it would have been a little curious, if not embarrassing, for James T. Jones to have virtually conceded his fraud by premitting any claim against the sheriff for so much of the goods sold as were necessary to satisfy the execution, and then ask for the excessive sale. It is unnecessary, however, to pass on this question, as it is not before us. The sheriff was answerable for his breach of duty if he did sell more goods than were necessary, and the money in his hands he holds in trust for the party rightfully entitled to it. This disposes of the exception taken by plaintiff to the refusal of the ninth instruction.

The eighth instruction was faulty in that it assumed

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as a fact, that there was "property after acquired by said James T. Jones, and for which he still owes."

2 FRAUDULENT
CONVEYANCES.

The very matter in dispute was, as to whether he or his father acquired this property. True, the evidence, if credited, showed that the goods were bought *pro forma*, in the name of James T. Jones, but this evidence also showed that the father conducted the whole transaction, and received and held the goods, and the merchants never even saw James T. The very matter on trial was to ascertain which one, as between father and son, was the real owner of the goods, the real party in interest. No matter in whose name the purchases were made, if in fact the goods were bought for the father, they were subject to his debts. The plaintiff argues this issue as if the merchants who sold the goods in the name of the son, were actors in this suit. As to them James T. is their debtor. But they are not interpleaders in this action. They have no lien on the goods. And if in fact James' name was used by the father as a screen to hide the after acquired goods from the father's creditors, it was a fraud on his creditors, and these goods, as between them, were subject to the seizure made by the sheriff. Whereas the eighth instruction ignored the question as to the relation the new sustained to the old goods, with which they were mingled, and whether or not their purchase was a part and in furtherance of the original alleged fraudulent scheme, as also, whether they were not, in fact, as between father and son, to be paid for by the father; but on the contrary, it told the jury that notwithstanding the fraudulent combination, the goods afterward acquired in the name of James, and which he owed for as to "other merchants" were exempt from the execution in question. The second instruction, given on behalf of defendant, together with others granted by the court, fairly presented the issues to the jury. If James did lend his name to his father as a cover of fraud, and it results in leaving him liable for the debts incurred to those "other

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merchants," he will only have learned by experience what he should have accepted on faith, that "the way of the transgressor is hard."

The judgment of the circuit court is affirmed. MARTIN, C., concurs; WINSLOW, C., absent.

THE STATE *ex rel.* RAMEY, *Prosecuting Attorney*, v. DAYTON,
Appellant.

Domicile. Residing and engaging in business at a particular place do not, of themselves, make that the domicile of the person. There must, in addition, be the mental determination of making a home there.

Appeal from Buchanan Circuit Court.—HON. J. P. GRUBB,
Judge.

REVERSED.

Pike & Pike for appellant.

No actual change of domicile or inhabitancy. *Hart v. Horn*, 4 Kas. 232; *Hairston v. Hairston*, 27 Miss. 721; *Maddox v. State*, 32 Ind. 111; *Hindman's Appeal*, 85 Pa. St. 466. Conduct of business in Kansas City did not constitute a removal. *Roberts' Will*, 8 Paige 446; *Walker v. Walker*, 1 Mo. App. 404; *Re. Fitzgerald*, 2 Caines 318; *Crawford v. Wilson*, 4 Barb. 504. Going out of state, county or town for a purpose and not taking up a permanent residence elsewhere, no removal. *Sackett's case*, 1 Mass. 58; *Abington v. Boston*, 4 Mass. 312; *Walker's case*, 4 Mass. 556; *Granby v. Amherst*, 7 Mass. 1; *Lincoln v. Hapgood*, 11 Mass. 350; *Chariton Co. v. Moberly*, 59 Mo. 238; *Johnson v. Smith*,

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43 Mo. 501; *Bartlett v. New York*, 5 Sandf. 44; *Carey's Appeal*, 75 Pa. St. 201.

H M. Ramey for respondent.

MARTIN, C.—On the 31st day of October, 1877, the prosecuting attorney of Buchanan county filed in the circuit court of that county an information in the nature of a *quo warranto* against the defendant, alleging that prior to the 15th day of August, 1877, the defendant was a duly elected and qualified member of the board of councilmen of the city of St. Joseph, for the second ward of said city, and that on the last named date he removed from said city of St. Joseph to Kansas City, and changed his domicile to said latter place, and thereby vacated his said office; that notwithstanding said vacation of his office the defendant continued to exercise the functions thereof. The defendant answered the information under protest, admitting his election and qualification to the said office, and denying that he had removed from the city or changed his domicile, averring that he was a resident of the city of St. Joseph, domiciled in the second ward. A reply was filed putting the new matter of the answer in issue.

At the trial the following evidence was submitted: Buckingham testified: That Mr. Dayton told him that he was going to Kansas City; he did not say he was going to remove his family, but might do so in January; did not remember the words used by Dayton, only the substance; Dayton said he was going into business with Tootle, Hanna & Co. James E. Roberts testified: That one Sunday morning before suit was brought, he remarked to Dayton that he heard he had gone to Kansas City, and he said he had; asked him if he had taken his family down, and he replied that he had not, but would do so; did not say why or for what purpose he had gone to Kansas City. Ex-Governor Woodson testified that he also remarked to Dayton that he heard he was going to Kansas City, and

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Dayton told him he was going in two or three days, but that his family would remain during the winter, or until January. Mr. Thompson testified to a similar conversation, and so did Mr. Piner. Defendant admitted that he had not been engaged in business in St. Joseph since August 15th, 1877, but had been since that date engaged in business in Kansas City. This was all the evidence produced by the relator.

Dayton testified: "I am now doing business in Kansas City, Missouri, with Tootle, Hanna & Co.; am employed by them on a salary; my home is now in the second ward of this city (St. Joseph), and I have resided there eleven years. I come home every Saturday night; I have no other home than in the said second ward, St. Joseph; have no fixed intention of going to Kansas City to live, and do not know that I will be engaged in business there longer than January 1st, 1878; I have a family which now resides, as it has for eleven years, in said second ward of St. Joseph."

Cross-examination. "Went to Kansas City August 15th; arranged with Tootle, Hanna & Co, about that time; made no permanent arrangement with them beyond a fixed salary until January 1st, 1878; I am just trying the business with them; if we suit each other I may remove there. I stop at the hotel in Kansas City, and come home to my family every Saturday night. I probably told Mr. Roberts what he said I did." To the court: "I went to Kansas City to make an experiment with Tootle, Hanna & Co.; I had no fixed intention of going there to remain permanently; if I could agree with them and make terms to suit, I intended to stay there; I had no fixed intention to abandon my home here; my going there was only an experiment; did not leave here with the purpose of remaining away except conditionally; but if I could make agreeable business arrangements with Tootle, Hanna & Co. would go there to live." This was all the evidence.

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The court found the issues for the plaintiff, and gave a judgment of ouster. The defendant appealed from this judgment.

Since the decision of the case of *State ex rel. v. Fitzgerald*, 44 Mo. 425, in which it was held that a proceeding in the nature of a *quo warranto* would lie against a person exercising the rights and privileges of a member of the council of the city of St. Joseph, no doubt can be entertained about the legality of the remedy here invoked.

The only question presented to us for consideration is, whether the evidence in the record was sufficient to sustain the judgment of ouster appealed from. The charter of the city of St. Joseph contains the following provision: "If any councilman shall, after his election, move from the ward from which he was elected in said city, his office shall be thereby vacated." Sess. Acts 1857, p. 89, § 5. The information declared that the defendant had removed from St. Joseph and had changed his domicile to Kansas City. The defendant denied this.

The obvious purpose of the provision was to prohibit any representation of a ward in the city council by any one not an actual resident or inhabitant of the ward. Whether his ability to discharge the duties of a councilman was or was not impaired by reason of the absence complained of, is immaterial. He must answer to the council for that. He might, as a matter of fact, continue to discharge all his duties in the council, and yet lose his position as a councilman, by changing his domicile to another ward. On the other hand, he might be a constant delinquent in the council by reason of temporary absence from the State, and yet retain his position there, so far as the courts are concerned, by retaining his domicile in the ward he was elected from. His position as councilman depends upon his status as an inhabitant of the ward, and that is determined by the law which defines the domicile of the citizen. Removal and change of domicile are treated

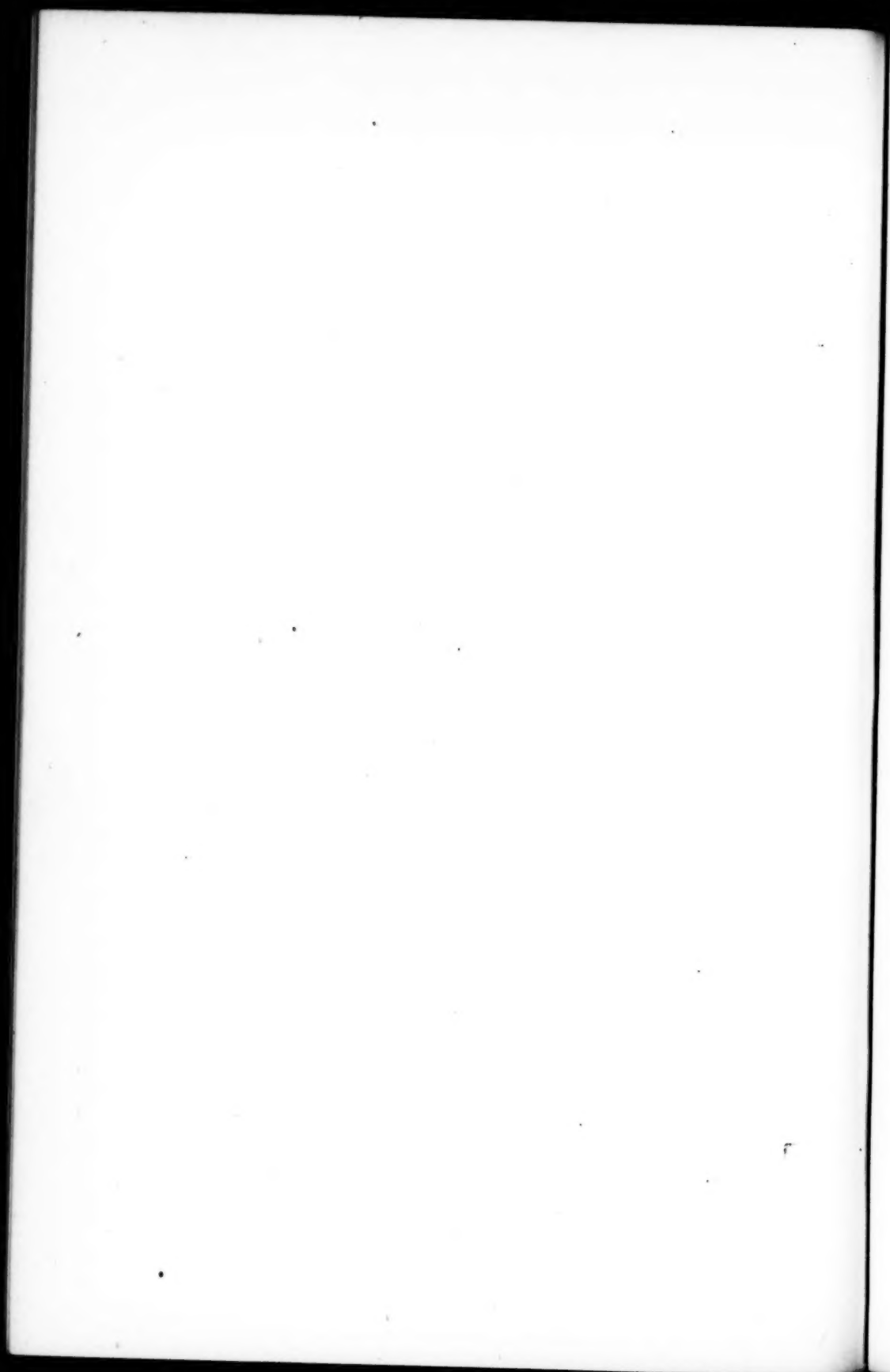
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in the pleadings as equivalent terms. Being a resident of the ward domiciled with his family there, his domicile will be presumed to continue until it is shown he has changed it. The evidence of such change consists in this case of his engaging in business in Kansas City, which required him to be there the greater portion of his time. But to give him a domicile in Kansas City, two things must concur. It is not sufficient that he is there the greater portion of his time; his stay there must be with the intention of making it his home or domicile. Physical stay or residence in any particular place will not, of itself, constitute a domicile. The physical act of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides. *Johnson v. Smith*, 43 Mo. 499; *Chariton Co. v. Moberly*, 59 Mo. 238.

The evidence in this case failed to show at the filing of the information that defendant's stay in Kansas City was accompanied with the intention of making that place his domicile. The most that can be claimed of it is, that he contemplated in the future a removal of his domicile to Kansas City. The intention related to the future. He had not carried it out. His family remained in the second ward of the city of St. Joseph, the same as before, and he returned every Saturday to that place and abided in it as before. In this age of rapid transportation, his temporary absence in Kansas City, may not have interfered with his duties as a councilman any more than if he was conducting his business in another ward of the city of St. Joseph. But as already stated, considerations of this character belong to the council and not to the courts. He testified that he had no other home, and that he had no fixed intention of going to Kansas City to remain permanently, and that his future removal to that city depended upon the outcome of his business connections with Tootle, Hanna & Co. The evidence in the record fails to support the finding of a removal within the meaning of the char-

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ter of the city, and the judgment of ouster ought to be reversed. Accordingly, the judgment of the circuit court is reversed, the writ of *quo warranto* denied, and the information dismissed. PHILIPS, C., concurs; WINSLOW, C., absent.



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ACTION.

ACTION AT LAW: JURISDICTION: EQUITY. A court of equity will prevent a threatened injury where the remedy at law is inadequate. But failure to invoke this remedy is no bar to an action at law for the injury actually done. Per SHERWOOD, J. *The Town of Warrensburg ex el Colbern v. Miller*, 56.

—— ON DUPLICATE EVIDENCES OF INDEBTEDNESS. *Skinner v. Skinner's Ex'r*, 148.

—— To FORECLOSE. *Smith v. Finn*, 499.

ADMINISTRATION.

1. **WIDOW'S ALLOWANCE: WILL.** The husband has no power by will to dispose of the articles which by section 33, page 88, Wagner's Statutes, are allowed to the widow as her absolute property. *Hasenritter v. Hasenritter*, 162.
2. ———: ———: ———. A provision in the will of the husband in favor of the wife, will never be construed by implication to be in lieu of dower or any other interest in his estate given by law: the design to substitute one for the other must be unequivocally expressed. *Ib.*
3. **REPLEVIN: SURETIES.** If a surety in a replevin bond given by an administrator pay a judgment in the action against the administrator, he will be entitled to recover the amount from the sureties in the probate bond of the administrator. *The State to the use of Walsh v. Farrar*, 175.
4. **SETTLEMENT OF DECEASED GUARDIAN'S ACCOUNTS: APPEAL.** An appeal from proceedings against the executor of a deceased guardian to compel him to settle the accounts of the guardianship, must be taken during the term or within ten days thereafter, as prescribed by the Administration Act, (Wag. Stat., p. 119, § 2; R. S. 1879, § 293,) and not within six months after the decision, as prescribed by the Guardian Act, (Wag. Stat., p. 681, § 50; R. S. 1879, § 2616). *Cissell v. Cissell*, 371.

5. **CLASSIFICATION OF DEMANDS: PROBATE COURTS: JURISDICTION.** Under the statute, (R. S. 1879, § 184,) demands legally exhibited against an estate after the end of one year, and within two years after the grant of letters, must be placed in the sixth class. The fact that at the time of their allowance there had been no distribution of assets, will not entitle them to be placed in the fifth class. Probate courts have no equitable jurisdiction in the classification of demands. *Burckhart v. Helfrich*, 376.
6. ———: ———: **EXHIBITION OF DEMANDS.** The mere rendition of a judgment against a surety and the administrator of his principal before the end of one year after the grant of letters to the administrator, is not a legal exhibition by the surety within the year of any demand against his principal's estate. Until he has paid the judgment he has no demand to exhibit. When he has done this, his claim must be presented to the administrator, and will be classified as of the date of such presentment. *Ib.*
7. **ADMINISTRATOR'S DEED.** In pursuance of an order of the probate court made February 10th, 1861, an administrator, in April, 1861, sold real estate, and immediately executed and delivered a conveyance, and made out a report of sale; but the report was never presented to the court until July, 1862, at which time an order was made approving the sale as of the April term, 1861, and on the same day the administrator's letters were revoked. *Held*, that while the proceedings were irregular, the irregularity was not such as to invalidate the deed. *Wilcoxon v. Osborn*, 621.

ADVERSE POSSESSION.

1. **THE possession of a life tenant cannot be adverse to the remainderman.** *Sutton v. Casseleggi*, 397.
2. **THOUGH** a deed be void, possession taken and held under it will be adverse as against the grantor and those claiming under him. *Ib.*
3. **BY THE PUBLIC.** In the absence of a dedication, possession and user of land by the public under claim of right for a period short of the statutory period of limitation, will not vest title in the public. *Price v. The Inhabitants of the Town of Breckenridge*, 447.
4. **NOTWITHSTANDING** the paper title of opposing parties may be derived from a common grantor, either may assert against the other an independent title by possession. *Wilcoxon v. Osborn*, 621.

AMENDMENT.

See *Allen v. McMonagle*, 478; *La Riviere v. La Riviere*, 512.

APPEALS.

If an appeal be not taken in time the appellate court has no power to make any order in the case except to dismiss the appeal or strike

the case from the docket. It cannot inquire into the jurisdiction of the lower court. *Cissell v. Cissell*, 371.

— IN "CASES INVOLVING TITLE TO REAL ESTATE." *Baier v. Berberich*, 413.

ASSAULT.

1. FELONIOUS ASSAULT TO KILL. The indictment in this case charging a felonious assault with intent to kill, punishable under section 29, page 449, Wagner's Statutes; *Held*, to be good under that section. *The State v. Webster*, 566.
2. ——. A person indicted under section 29, page 449, Wagner's Statutes, for a felonious assault with intent to kill, could not be convicted and punished under section 32, page 449, Wagner's Statutes. It was not until the Revised Statutes 1879, (section 1655,) that upon an indictment for a felonious assault, the defendant could be convicted of a lower offense. *Ib.*

See also *The State v. Weeks*, 496.

ATTACHMENT.

1. SUCCESSIVE ATTACHMENTS: PRIORITY OF WRITS. Successive writs of attachment in the hands of different officers may be levied on the same goods, and in the distribution of the proceeds will be entitled to priority in the order in which the levies are made. The possession of the officer making the first levy is not to be disturbed, but the subsequent levies are to be made by notifying him and by making return of the levies upon the respective writs. Every levy so made will hold the surplus of the proceeds left after satisfying all older levies. *Patterson v. Stephenson*, 329.
2. ATTACHMENT: EXEMPTION: BURDEN OF PROOF. Where the right of an attaching creditor is contested by a transferee of the debtor on the ground that the goods in controversy were exempt from attachment in the hands of the debtor; *Held*, that the burden of proving such exemption is on the transferee. *Stone v. Spencer*, 356.

ATTORNEY AND CLIENT.

1. ATTORNEY'S NEGLIGENCE. A garnishee is bound by his attorney's negligence the same as any other defendant. *Fretwell v. Lafoon*, 26.
2. ATTORNEY'S FEES: PLEADING. The petition in a suit to recover attorney's fees, failed to aver directly that the plaintiff had obtained a license to practice law. *Held*, not a defect that could be taken advantage of in arrest. *Kersey v. Garton*, 645.
3. IF an attorney is prevented by his client from completing his employment, he will be entitled to recover his fees as if the contract was fully performed. *Ib.*

BAILMENT.

1. DEPOSIT WITH BANK FOR THIRD PARTY: RIGHTS OF THE LATTER. If bankers receive money from a customer on an express promise to pay it to a third party, the latter may maintain an action for it if not paid; and it will be no defense that the money was deposited in the customer's name with his consent, or that he at the time promised to make a further deposit to cover his own indebtedness to the bank and failed to do so. *Ulley v. Tolfree*, 307.
2. PUBLIC FUNDS DEPOSITED IN BANK. The State cannot maintain an action against a bank in which the county treasurer has deposited public money, except by way of garnishment on execution against the treasurer, or perhaps, where there has been fraudulent collusion between the bank and the treasurer, and he and his sureties are insolvent, by a proceeding in equity to follow the funds in the hands of the bank. *The State v. Rubey*, 610.

CONSIGNOR A "TRUSTEE OF AN EXPRESS TRUST" TO SUE. *Snider v. Adams Express Company*, 523.

BILL OF EXCEPTIONS.

THIS court will not disregard a bill of exceptions as having been filed after the term, unless that fact appears affirmatively by the record. *Taylor v. Newman*, 257.

BILL OF EXCHANGE.

1. INLAND BILL OF EXCHANGE: CONSIDERATION: PLEADING. An instrument in this form: "Building committee will pay G. W. T. the sum of \$126.25 and charge to (signed) N. and L.," is an inland bill of exchange, and as such, under the law merchant, imports a consideration without the words "value received." In declaring upon such an instrument no consideration need be alleged. *Taylor v. Newman*, 257.
2. BILL OF EXCHANGE: ACCEPTANCE: PLEADING. In an action against the drawer of a bill of exchange payable on demand, the petition alleged a conditional acceptance the effect of which was to postpone payment, but failed to allege that the drawer had had timely notice of the nature of the acceptance and had consented to it, or that the drawee had not kept the terms of his acceptance, or to make averments showing that as between the drawer and drawee the former had no right to draw the bill. The reply, however, did allege that after non-payment of the bill the drawer, with knowledge of the acceptance and non-payment, agreed to pay. *Held*, that for want of some one of the averments so omitted from the petition it should have been held bad on demurrer to the evidence; *Held* also, that the defect was not cured by the reply. *Id.*

BONDS.

1. A BOND is not void because the names of the obligors do not appear in the body of it. *Treasurer of the State Lunatic Asylum v. Douglas*, 647.
2. STATE LUNATIC ASYLUM: BLANK BOND. The obligors in a bond given to the treasurer of the State Lunatic Asylum bound themselves "to pay to said treasurer, or his successors in office, the sum of ——— dollars per week for the board of" a patient. *Held*, that the omission to fix the rate of board per week did not invalidate the bond. The law would imply a reasonable rate; and under the statute, (G. S. 1865, p. 305, § 9,) a statement certified by the superintendent of the asylum, would be *prima facie* evidence of the amount due. *Ib.*

GUARDIAN'S BONDS. State ex rel. McKown v. Williams, 463.

COUNTY BONDS. Dallas County v. Merrill, 573.

PLEADING EXECUTION OF A BOND. State ex rel. Phillips v. Rush, 586.

COMMON CARRIERS.

CONTRACTS LIMITING LIABILITY OF COMMON CARRIERS. A written contract, containing provisions limiting the liability of a railroad company, as a common carrier, in the transportation of cattle; *Held*, in the absence of fraud or mistake, to be the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the cattle were loaded into the cars with a previous verbal understanding as to the terms of shipment, and presented to him for signature when there was no sufficient time for its examination before the departure of the train. Compare *Dawson v. The St. L., K. C. & N. R'y Co.*, 76 Mo. 514. *The St. Louis, Kansas City & Northern Railway Company v. Cleary*, 634.

CONFLICT OF LAWS.

1. GUARDIAN'S BOND: LAW OF SISTER STATE. A bond given in a probate court of this State, in conformity with a law of another state, by a guardian in this State of a ward resident here, in order to obtain possession of property of his ward located in the other state, is a valid bond, and an action may be maintained on it for property received in virtue of it. *The State ex rel. McKown v. Williams*, 463.
2. COUNTY BONDS: CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS. The fact that county bonds held void by the courts of this State are held valid by the courts of the United States, and, therefore, when transferred to a non-resident holder may be enforced against the county, will not authorize the courts of this State to require a resident holder of such bonds to deliver them up to be cancelled. *Dallas County v. Merrill*, 573.

CONSTITUTIONAL LAW.

1. **REMOVAL OF DEAD ANIMALS IN CITIES : CONSTITUTIONAL LAW.** Under the constitution of this State, a city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they become a nuisance. *The River Rendering Company v. Behr*, 91.
2. **THE OLEOMARGARINE ACT.** The act prohibiting the manufacture or sale of oleomargarine or any other article in imitation of butter or cheese, is constitutional. Acts 1881, p. 120. *The State v. Addington*, 110.
3. **INTER-STATE COMMERCE: CONSTITUTIONAL LAW.** State enactments which have the effect of regulating commerce between the states are not obnoxious to that provision of the constitution of the United States which declares that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes," unless they conflict with regulations on the same subject prescribed by congress. *Ib.*
4. **CONSTITUTIONAL LAW: POLICE POWER.** Defendant being prosecuted under the act prohibiting the manufacture and sale of oleomargarine, by way of establishing his point that the act was not a proper exercise of the police power, and was, therefore, unconstitutional, offered to show that oleomargarine was wholesome as an article of food. *Held*, that this offer was properly rejected. The constitutionality of the act could not be tested in that way. *Ib.*
5. **——: ACTS OF THE LEGISLATURE ARE PRIMA FACIE VALID.** Though the State cannot under the guise of the police power overthrow the rights which the constitution guarantees, yet the legislature may do many things in the legitimate exercise of that and other powers, which, however injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative power. In all cases the courts presume that acts of the legislature are constitutional. The burden is upon him who alleges the contrary to prove it beyond a doubt. *Ib.*
6. **CRUEL AND UNUSUAL PUNISHMENT.** Imprisonment in the penitentiary for two years is not a cruel or unusual punishment within the inhibition of section 25, article 2 of the Constitution of 1875, for the crime of obtaining money by false and fraudulent representations under section 1561 of the Revised Statutes of 1879. *The State v. Williams*, 310.
7. **STATUTE VOID IN PART.** The maximum punishment imposed by a statute for a crime may be regarded as cruel and unusual within the inhibition of the constitution, without affecting the validity of the statute so far as it imposes a minimum punishment not obnoxious to the objection. *Ib.*
8. **DOWER.** The legislature has no power to divest inchoate dower; and, in the case at bar, did not, by the special act, (Sess. Acts 1855, p.

614,) authorizing the husband's guardian to sell his real estate, assume to do so. *Williams v. Courtney*, 587.

— PROHIBITION AGAINST "LOANING OUT" PUBLIC FUNDS. *The State v. Rubey*, 610.

CONTRACTS.

1. PROMISE OF THIRD PERSON TO PAY DEBT OF ANOTHER. The simple acceptance, by suit or otherwise, by a third person of a promise made to pay a debt due such third person from another, will not operate to release such other person from liability to such third person on account of such debt. To extinguish the obligation of the original debtor, it must appear that the subsequent obligation was accepted in lieu of his; otherwise the second obligation will be regarded only as collateral and additional to the first. *Briscoe v. Callahan*, 134.
2. DUPLICATE EVIDENCES OF INDEBTEDNESS, ACTION ON. A man about to marry executed a promissory note in favor of his intended wife, whereby he bound his legal representatives, twelve months after his death, to pay her \$4,000. On the same day he executed a deed of trust on real estate to secure the payment of this note, and he and his intended wife executed a marriage contract wherein he stipulated for the payment of said \$4,000, and in consideration thereof she agreed to claim no dower or other right in his estate. The marriage took place, and the husband having died, the wife presented the note for allowance against his estate. Objection being made to the introduction of the marriage contract at the trial; *Held*, that inasmuch as the note, under the statute, imported a consideration, it was not necessary to introduce the marriage contract by way of showing a consideration for the note, but inasmuch as the contract and note related to the same transaction the introduction of the contract could not prejudice the estate. *Held*, also, that although they both represented the same indebtedness, it was not necessary to sue upon both, since satisfaction of either would be a bar to recovery on the other. *Skinner v. Skinner's Executors*, 148.
3. JOINT DEBTORS, RELEASE OF. Under the statute, (Gen. St. 1865, p. 398, § 9,) a creditor might release one joint debtor without impairing his right to demand and collect the remaining indebtedness from the other debtor. *Held*, also, in the case at bar, that no intention to release had been shown. *Hill v. Alexander*, 296.
4. If an attorney is prevented by his client from completing his employment, he will be entitled to recover his fees as if the contract was fully performed. *Kersey v. Garton*, 645.

CONVERSION.

1. ANY wrongful taking or assumption of a right to control or dispose of property constitutes a conversion. Any wrongful act, which negatives or is inconsistent with the plaintiff's right, is *per se* a conversion. *Allen v. McMonagle*, 478.

2. JUSTICES' COURTS: COMPLAINT: APPEAL TO CIRCUIT COURT: AMENDMENT: CONVERSION. A statement filed in a justice's court was in the following form: "J. McM. Dr. to S.W. A., To nine sheep, \$25." *Held*, (1) That this was a sufficient statement of a claim for the conversion of the sheep; (2) That it was proper to allow the plaintiff, when the case reached the circuit court, to file an amended statement setting out his claim more fully. *Ib.*

CORPORATION.

1. ACTION BY STOCKHOLDER AGAINST DIRECTORS FOR FRAUD. Where the petition in a suit brought by a stockholder against certain directors of a corporation for a fraudulent breach of trust in dealing with the corporate property, failed to show either that the corporation had refused to sue or that it was under the control of the defendant, but no objection was made on that score until the case reached this court, *Held*, that it could not then be sustained, though if made in time it would have been. *Bulkley v. Big Muddy Iron Company*, 105.
2. NOTICE TO CORPORATION: ON WHAT OFFICERS SERVED. In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer, whose official relation to the governing body, or managing agent, or chief officer, would make it his duty to communicate the notice, will be sufficient. The secretary is such an officer. *Heltzell v. The Chicago & Alton Railroad Company*, 315.
3. LIEN FOR MATERIALS: SERVICE OF NOTICE. A party seeking to enforce a lien against a railroad for materials furnished in its construction, in the absence of all the officers of the company caused a notice of his claim to be served on a person who had desk-room in the office of the company, but no connection with its affairs. *Held*, that this was not service upon the company, and did not, therefore, fulfill the requirements of section 3202, which makes the service of such notice upon the company an essential prerequisite to a lien. *Heltzell v. The Kansas City, St. Louis & Chicago Railroad Company*, 482.

NATIONAL BANKS. *Wherry v. Hale*, 20.

ULTRA VIRES. *Wherry v. Hale*, 20.

CORPORATION DEED: FORM OF SIGNATURE: SEAL: ACKNOWLEDGMENT.
City of Kansas v. Hannibal & St. Joseph Railroad Company, 180.

COSTS.

1. BREACH OF WARRANTY. There is no question of the right of a covenantor evicted by law to recover the costs of the suit if he gave notice of its pendency to the grantor or his legal representative. *Hutchins v. Roundtree*, 500.
2. COSTS, UPON COMPROMISE OF SUIT. After the institution of a suit the parties compromised and the plaintiff executed a release to de-

fendant of the cause of action sued for, and authorized a dismissal of the suit. No provision was made as to costs. *Held*, that the release operated to bar any right on the part of the plaintiff to recover of defendant the costs already accrued, except such as had been adjudged against him. *Thompson v. The Union Elevator Company*, 520.

COUNTY.

1. **COUNTY AND TOWNSHIP FUNDS: ACTION BY THE STATE TO RECOVER.** Under the laws now in force, county funds are the property of the county and not of the State, and the State has no right to sue for their recovery, except in actions brought to the use of the county on bonds of officers, which are by law required to be given to the State to the use of the county. Except in such cases, the suit should be in the name of the county. Where township organization is in force, the same rules apply to township funds. *The State v. Rubey*, 610.
2. **PUBLIC FUNDS DEPOSITED IN BANK.** The State cannot maintain an action against a bank in which the county treasurer has deposited public money, except by way of garnishment on execution against the treasurer, or perhaps, where there has been fraudulent collusion between the bank and the treasurer, and he and his sureties are insolvent, by a proceeding in equity to follow the funds in the hands of the bank. *Ib.*
3. ———. The act of February 11th, 1881, (Sess. Acts 1881, p. 35,) does not authorize such an action. *Ib.*
4. ———: "LOANING OUT." The prohibition found in section 1327, Revised Statutes, against public officers' "loaning out" the public moneys, does not forbid the depositing of such moneys in bank. *Ib.*

COUNTY BONDS.

COUNTY BONDS: CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS. The fact that county bonds held void by the courts of this State are held valid by the courts of the United States, and, therefore, when transferred to a non-resident holder may be enforced against the county, will not authorize the courts of this State to require a resident holder of such bonds to deliver them up to be cancelled. *Dallas County v. Merrill*, 573.

COURTS.

APPEALS FROM ST. LOUIS COURT OF APPEALS. *Baier v. Berberich*, 418.

COVENANTS.

DAMAGES FOR BREACH OF. *Hutchins v. Roundtree*, 500

See also, *Johnson v. Wilson*, 639.

CRIMINAL LAW.

1. **CARNAL KNOWLEDGE OF INFANT FEMALE BY HER PROTECTOR: INSTRUCTIONS.** There can be no conviction under the statute against carnal knowledge by a man of a female under the age of eighteen years confided to his care and protection, if the act was accomplished by force; and an instruction which loses sight of this distinction is erroneous, but if there is no evidence of force in the case, the error is harmless and will be no ground for reversal. *The State v. Woolaver*, 103.
2. **DEFENDANT'S TESTIMONY.** Testimony given by the defendant in a criminal case in his own behalf, may be used against him on a subsequent trial. *The State v. Jefferson*, 136.
3. **WRIT OF ERROR CORAM VOBIS: IMPRISONMENT OF PERSON UNDER EIGHTEEN IN PENITENTIARY.** It is well settled that for an error in fact in the proceedings of a court of record, a writ of error *coram vobis* will lie to revoke the judgment, whether it be a court of civil or criminal jurisdiction. Thus, where a person under the age of eighteen years is sentenced to the penitentiary, the court may at any time, upon being advised of the fact, revoke the sentence and commit the prisoner to jail. The usual way of bringing such matters before the court, according to the practice in this State, is by motion supported by affidavit or evidence. *Ex Parte Gray*, 160.
4. **INDICTMENT MUST BE SIGNED.** Under the present statute, (R. S. 1879, § 1798,) an indictment not signed by the prosecuting attorney, is a nullity. *The State v. Bruce*, 193.
5. **CRUEL AND UNUSUAL PUNISHMENT.** Imprisonment in the penitentiary for two years is not a cruel or unusual punishment within the inhibition of section 25, article 2 of the Constitution of 1875, for the crime of obtaining money by false and fraudulent representations under section 1561 of the Revised Statutes of 1879. *The State v. Williams*, 310.
6. **STATUTE VOID IN PART.** The maximum punishment imposed by a statute for a crime may be regarded as cruel and unusual within the inhibition of the constitution, without affecting the validity of the statute so far as it imposes a minimum punishment not obnoxious to the objection. *Ib.*

DAMAGES.

1. **FOR FAILURE TO RETURN.** Where no damages are proven, a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law. *The State ex rel. Ross v. Case*, 247.
2. **COVENANT OF WARRANTY: DAMAGES RECOVERABLE UPON BREACH.** The general rule is that for a breach of covenant of seizin and warranty, the measure of damages is the purchase money with interest. But where the covenantee has had possession and use of the premises he can recover no interest for any period prior to his eviction without proof that he has responded to his evictor for mesne profits.

and then only for such period as he shall have so responded, which, under our statute of ejectment, (R. S. 1879, § 2252,) can in no case be longer than five years. *Hutchins v. Roundtree*, 500.

3. ———: COSTS. There is no question of the right of a covenantee evicted by law to recover the costs of the suit if he gave notice of its pendency to the grantor or his legal representative. *Ib.*
4. EXEMPLARY DAMAGES FOR THE EJECTION OF PASSENGERS. A passenger is not entitled to exemplary damages for an ejection from a railroad train where the conductor acts in good faith, with no malice to the passenger, and uses only such force as is necessary for his removal, although he may be mistaken as to his duty and the plaintiff's rights. *Logan v. The Hannibal & St. Joseph Railroad Company*, 663.

——— IN EJECTMENT. *SUTTON v. Casseleggi*, 397.

DEDICATION.

1. DEDICATION TO PUBLIC USE. Land marked "Public Square" on a plat duly executed and acknowledged by the proprietor, is thereby dedicated to public use. *Price v. The Inhabitants of the Town of Breckenridge*, 447.
2. ———. The facts in this case, *Held*, sufficient to justify a finding that a dedication had been made to public use. *Ib.*
3. ———: ADVERSE POSSESSION. In the absence of a dedication, possession and user of land by the public under claim of right for a period short of the statutory period of limitation, will not vest title in the public. *Price v. The Inhabitants of the Town of Breckenridge*, 447.
4. DEDICATION BY ACTS IN PAYS: EVIDENCE. In a case where, without judicial proceeding, or compensation, or solemn form of conveyance, it is sought to establish *in pais* a divestiture of the citizen's landed property in favor of the public, the proof ought to be so cogent, persuasive and full as to leave no reasonable doubt of the existence of the owner's intent and consent; and the conduct and acts relied on to establish the intent should be inconsistent and irreconcilable with any construction except such consent; nor must there be declarations and acts by the owner inconsistent with the dedication.
Tested by these rules, the evidence in this case fails to show a dedication. *Landis v. Hamilton*, 554.
5. ACCEPTANCE. To constitute a dedication of property to public use there must be an acceptance by the public. This may be evidenced by user for a long period, or by its official recognition by the constituted authorities. The user should be such as to indicate that the enjoyment by the public is exclusive and not subordinate or incidental to the convenience of the owner. *Ib.*

6. WHERE a city, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterward the city declined to pay the damages that were assessed, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city." *Held*, that the citizens who instigated the proceedings were concluded from asserting a prior dedication of the same land for public use as a street. *Ib*.

CONDITIONAL DEDICATION OF STREETS. *The City of St. Louis v. Meier*, 13.

DEEDS.

1. RECORD OF DEEDS: SEAL OF OFFICER. Where a record of a deed shows a scroll affixed to a notary's certificate of acknowledgment, it will be admissible in evidence, though there is no recital either in the body of the certificate or in the testimonium clause thereof that the certificate is given under seal. *The City of Kansas v. The Hannibal & St. Joseph Railroad Company*, 180.
2. CORPORATION DEED: FORM OF SIGNATURE: SEAL: ACKNOWLEDGMENT. The granting clause of a deed, the record of which was offered in evidence, was as follows: "Know all men by these presents, that the W. K. Land Company, by S. H., President, and T. S. C., Secretary, * * * has granted," etc. The attestation clause and signatures were as follows: "In witness whereof, we hereunto subscribe our names and affix our seals." (Signed) "S. H., President, (Scroll); T. S. C., Secretary, (Scroll); W. K. Land Company, (Scroll)." The certificate of acknowledgment stated that S. H., President, and T. S. C., Secretary, "acknowledged that they executed and delivered the same as their voluntary act and deed." *Held*, that the deed was the deed of the corporation. The form of signature did not make it the individual deed of S. H. and T. S. C.; and one of the seals appearing on the record would be presumed to be the seal of the corporation.
HOUGH, C. J., and HENRY, J., dissented on the ground that the deed was not sealed with the common seal of the corporation and was not acknowledged to be the act of the corporation. *Ib*.
3. A CONVEYANCE OF THE WIFE'S LAND, executed and delivered by the husband and wife, will not pass her title, nor the husband's marital interest, unless it be acknowledged, and the acknowledgment be certified, in the manner prescribed by statute. *Hoskinson v. Adkins*, 537.
4. CERTIFICATE OF ACKNOWLEDGMENT. A certificate of acknowledgment of a deed, which shows that the acknowledgment was made by the grantor, but omits to name him, is not void for the omission. *Wilcoxon v. Osborn*, 621.

DEEDS OF TRUST AND MORTGAGES.

1. WRONGFUL ENTRY OF SATISFACTION: PAROL EVIDENCE TO AVOID IT. The payee of a negotiable note secured by a deed of trust, after parting with his interest in the note, acknowledged satisfaction of the deed

of trust on the margin of the record. In ejectment brought by a purchaser at a sale subsequently made by the trustee; *Held*, that he was not driven to a suit in equity to cancel the entry of satisfaction, but might show by parol evidence that the interest of the payee had expired, and, therefore, his power to acknowledge satisfaction.

Parol evidence to explain a record is always admissible. *Joerdens v. Schrimpf*, 383.

2. **DEED OF TRUST: POWER OF SALE: SHERIFF ACTING AS TRUSTEE: DEATH OF GRANTOR: RECITAL.** A deed of trust given to secure a note provided, among other things, (1) That in case of the absence, death, etc., of the trustee, the sheriff of the county should execute the power of sale conferred upon the trustee; (2) That any statement by "the said trustee" in the deed to be executed by him in pursuance of a sale, as to the non-payment of the note, the advertisement, sale, etc., should be *prima facie* evidence of the fact. *Held*, (1) That the death of the grantor did not revoke the power of the sheriff to sell; (2) That when the contingency arose in which the sheriff was authorized to act, he became *pro hac vice* the trustee, and proper recitals in a deed executed by him were to be received as *prima facie* evidence. *White v. Stephens*, 452.
3. **FORECLOSURE OF MORTGAGE.** An action under the statute for the foreclosure of a mortgage, is one at law and not in equity. Hence, where the case is tried by the court without a jury and no declarations of law are asked or given, if there is evidence to support the judgment below, there is nothing for this court to review. *Smith v. Finn*, 499.
4. **A JUDGMENT AGAINST A MARRIED WOMAN, in a suit against her and her husband to foreclose a mortgage executed by them upon the land, which establishes no personal liability against her, but only charges the land with the debt, is not a judgment against her within the meaning and scope of the authorities which declare judgments in actions at law against married women to be void.** *Fithian v. Monks*, 43 Mo. 502, and other cases distinguished. *Hoskinson v. Adkins*, 537.
5. **MORTGAGE: PAYMENT OF TAXES BY MORTGAGEE.** If the mortgageor fail to pay the taxes on the mortgaged premises, the mortgagee may pay them, and claim the benefit of the lien of the mortgage as security for the amount. But his claim must be enforced as a part of the mortgage debt, and not by an independent action against the mortgageor, as for money paid to his use, or under claim of subrogation to the lien of the State or municipality. *Horrigan v. Wellmuth*, 542.
6. **MORTGAGE, EXTINGUISHMENT OF.** Payment of the debt secured by a mortgage, will not extinguish the lien of the mortgage as a security for taxes properly paid by the mortgagee. *Ib.*
7. **FORECLOSURE.** A sale under defective foreclosure proceedings, although it may not carry the legal title to the land, will operate as a transfer of the equitable title to the mortgage. *Wilcoxon v. Osborn*, 621.

8. **PRIORITY AMONG INCUMBRANCERS: NOTICE.** The grantor in a deed of trust afterward conveyed the land by warranty deed, and subsequently by a second deed of trust, the beneficiary in the latter knowing of the warranty deed. Upon a foreclosure under the first incumbrance, there was a surplus after satisfying the debt. The grantor was insolvent and non-resident. *Held*, that the grantee in the warranty deed was entitled to the surplus in preference to the beneficiary in the second deed of trust. *Johnson v. Wilson*, 639.

DEPOSITIONS.

1. **THE deposition of a defendant taken in a cause may be read in evidence by plaintiff if relevant as an admission of defendant, though he is present and willing to testify.** *Pomeroy v. Benton*, 64.
2. **UNDER the statute, (R. S. 1879, § 2157,) to authorize the reading of the deposition of a witness residing in the county, it is not enough to show that he has gone to a greater distance than forty miles from the place of trial, but it must also be shown that such absence is without the consent, connivance or collusion of the party offering his testimony.** *Carpenter v. Lippitt*, 242.

DOGS.

SHEEP-KILLERS. Under the statute, (R. S. 1879, § 5434,) it is lawful for any person to kill a dog which has killed or maimed a sheep or other domestic animal; it is not necessary that the dog should be upon the premises of the owner of such animal, nor in the act of killing, nor that he should have killed more than one such animal, nor that the owner of the dog should have had notice of the killing. *Carpenter v. Lippitt*, 242.

DOMICILE.

RESIDING and engaging in business at a particular place do not, of themselves, make that the domicile of the person. There must, in addition, be the mental determination of making a home there. *The State ex rel. Ramey v. Dayton*, 678.

DONATIO CAUSA MORTIS.

1. **DELIVERY NECESSARY.** To support a *donatio causa mortis* there must be a delivery of the subject by the donor as a gift, and the delivery must be such as, in case of a gift *inter vivos*, would invest the donee with the title. *McCord's Administrator v. McCord*, 166.
2. **—: CASE ADJUDGED.** Where a father in his last illness placed a package of money in the possession of his son to take care of, and some days afterward directed the son, in case he should not get well, to take the money and, after paying funeral expenses, etc., to divide the remainder equally between himself and certain of his brothers and sisters; *Held*, that the only delivery ever made by the father

being by way of bailment and not in execution or contemplation of a gift, there was no *donatio causa mortis*.

The father at the same time gave instructions as to the settlement of his landed estate in which he directed a portion of the money to be used. He also made provision for payment of debts. *Held*, that these dispositions were void under the statute of wills; and as they and the gift of the money constituted but one transaction, the latter was for this reason also void. *Ib.*

DOWER.

DOWER. The legislature has no power to divest inchoate dower; and, in the case at bar, did not, by the special act, (Sess. Acts 1855, p. 614,) authorizing the husband's guardian to sell his real estate, assume to do so. *Williams v. Courtney*, 587.

— TESTAMENTARY PROVISIONS IN LIEU OF. *Hasenritter v. Hasenritter*, 162.

DRAMSHOPS.

1. **AN INDICTMENT FOR SELLING LIQUOR**, unlawfully, charged the selling to have been done "on or about the months of January, February and March." *Held*, that it was not open to the objection that it charged several offenses in one count, time not being of the essence of the offense. *The State v. Findley*, 338.
2. **SELLING LIQUOR TO MINOR.** The selling of intoxicating liquor by a dramshop keeper to a minor without the consent of his parent, guardian or master, is not an indictable offense. The only penalty prescribed by law is a forfeiture of \$50, to be recovered by civil action against the offender on his bond. Wag. Stat., p. 552, § 20; R. S. 1879, § 5454. *The State v. Amor*, 568.
3. **GIVING AWAY LIQUOR ON SUNDAY.** The giving away of intoxicating liquor on Sunday, by a dramshop keeper, is not an indictable offense. The only penalty prescribed by law is forfeiture of his license and prohibition against obtaining another license for a term of two years. Wag. Stat., p. 553, § 22; R. S. 1879, § 5456. *The State v. Burnett*, 570.

SALE OF INTOXICATING LIQUOR BY DRUGGISTS. *The State v. Roller*, 120.

DRUGGISTS.

1. **SALE OF INTOXICATING LIQUORS BY DRUGGISTS.** The act of March 26th, 1881, "To regulate the sale of medicines and poisons by druggists and pharmacists," by implication repeals the act of May 19th, 1879, "To regulate the sale of intoxicating liquors by dealers in drugs and medicines," etc. *NORTON, J.*, dissenting. *The State v. Roller*, 120.

2. ———. Under the present statute druggists are prohibited from selling or giving away any alcoholic liquors as a beverage; but they may sell such liquors for medical purposes, and that without the physician's prescription required by the former act. *Norton, J., dissenting. Ib.*

EJECTMENT.

1. ACTUAL TENANT, PROPER DEFENDANT. Tenants actually in possession, and not their landlord, are the necessary parties defendant to an action of ejectment. Under the statute though, the landlord may, on his own motion, be joined as a defendant. *Sutton v. Casseleggi, 397.*
2. WHERE tenants occupy separate parcels of land under a common landlord, they should be sued separately. If, however, they are sued jointly and there is judgment against them, the error will be immaterial, if the judgment is for possession with nominal damages only; otherwise, if substantial damages are awarded. *Ib.*
3. It is manifest error to give judgment for the plaintiff for the whole of the premises in controversy, when his own evidence shows that a part of the title is vested in others. *Price v. The Inhabitants of the Town of Breckenridge, 447.*
4. TENANTS IN COMMON: PLEADING: OUSTER. In an action of ejectment by one tenant in common against another, the ouster is admitted by a general denial, but the admission does not extend to the date of the ouster as alleged in the petition. *La Riviere v. La Riviere, 512.*

ELECTIONS.

QUO WARRANTO. In a *quo warranto* proceeding this court will not enter into an inquiry as to the legality of votes or the qualifications of voters. The statute provides another tribunal and a different mode of determining these matters, and this provision is exclusive. *The State ex rel. The Attorney General v. Mason, 189.*

EQUITY.

1. EQUITY PLEADING: TRUSTS. In a suit to enforce a trust attaching to real estate, the petition alleged that defendants' ancestor had purchased the land at a sale under a deed of trust executed by plaintiff, under an agreement that the ancestor should rent the land, receive the rents, and after re-imbursing himself for his outlays, re-convey to plaintiff; and that the rents, together with certain payments made by plaintiff, had more than made good all the outlays; and the petition prayed for a decree for the land and for any excess of rents. The court, besides decreeing the title to plaintiff, took an account of the outlays of defendants' ancestor and of the payments made by plaintiff, and the rents received by defendants, and gave judgment in plaintiff's favor for the excess of the latter. *Held, that this decree was within the scope of the pleadings. Hutcherson v. Briscoe, 373.*

1. **DEED OF TRUST: WRONGFUL ENTRY OF SATISFACTION: PAROL EVIDENCE TO AVOID IT.** The payee of a negotiable note secured by a deed of trust, after parting with his interest in the note, acknowledged satisfaction of the deed of trust on the margin of the record. In ejectment brought by a purchaser at a sale subsequently made by the trustee; *Held*, that he was not driven to a suit in equity to cancel the entry of satisfaction, but might show by parol evidence that the interest of the payee had expired, and, therefore, his power to acknowledge satisfaction.
Parol evidence to explain a record is always admissible. *Joerdens v. Schrimpf*, 383.
 3. **CANCELLATION OF CONVEYANCE FOR FRAUD.** Where the evidence showed that the parties to a conveyance of land were brothers, that the grantor was a cripple, diseased in body, and of weak mind, and under the control of the grantee by whom his fears of a breach of promise suit and loss of property were operated upon, for which there was no foundation in fact; that there was no consideration paid and none to be paid, and that the conveyance was induced by the fears of the grantor and the promise of the grantee to re-convey the land; *Held*, sufficient to warrant a decree setting aside and cancelling the conveyance. *Holliway v. Holliway*, 392.
 4. ———: **PRACTICE, CIVIL: DISMISSAL OF ONE OF THE COUNTS IN A PETITION.** Where the first count in a petition seeks the cancellation of a deed on the ground of fraud and undue influence, and the second count, a settlement of a partnership in personal property, the plaintiff may properly be allowed to dismiss the latter, since it states a separate cause of action. *Id.*
 5. **COUNTY BONDS: CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS.** The fact that county bonds held void by the courts of this State are held valid by the courts of the United States, and, therefore, when transferred to a non-resident holder may be enforced against the county, will not authorize the courts of this State to require a resident holder of such bonds to deliver them up to be cancelled. *Dallas County v. Merrill*, 573.
 6. **INFANT: NOT LIABLE EX AEQUO ET BONO FOR SERVICES RENDERED.** All the adult heirs at law to a tract of land affected by a will, united in employing attorneys to prosecute a suit to set the will aside, agreeing that in case of success, as compensation for their services, the attorneys should receive one-half of the land. Through the exertions of the attorneys the will was set aside. *Held*, that a minor heir, although benefited by the result equally with the others, was not bound either at law or in equity to contribute to the payment of the fee. *Dillon v. Bowles*, 603.
- **CREDITOR'S BILL TO VACATE JUDGMENT: EXTENT OF PLAINTIFF'S RECOVERY.** *Smith v. Sims*, 269.
- **ACTIONS HELD NOT TO BE SUITS IN EQUITY.** *Russell v. Berkstreser*, 417; *Smith v. Finn*, 499.

ESTATES IN LAND.

1. THE possession of a life tenant cannot be adverse to the remainderman. *Sutton v. Casseleggi*, 397.
2. A lease for years by one who is tenant in fee as to one undivided half and tenant for life as to the other undivided half of the premises, is valid as against the remainderman entitled to the latter half during the life of the lessor. *Ib.*

ESTOPPEL.

1. THERE can be no defense on the ground of estoppel where the defendant has neither acted nor altered his situation on account of what was said by the other party, nor unless the estoppel was pleaded. *Noble v. Blount*, 235.
2. ESTOPPEL: RECITAL IN BOND. A recital in a bond is a solemn admission by the obligor of the truth of the fact recited, and when, in an action against him, the bond is pleaded *in haec verba*, the effect is the same as if there was a formal plea of estoppel. *The State ex rel. McKown v. Williams*, 463.
3. BY RECORD It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for the costs and damages, will be bound by the litigation or procedure as much as the party to the record. *Landis v. Hamilton*, 554.
4. WHERE a city, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterward the city declined to pay the damages that were assessed, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city." *Held*, that the citizens who instigated the proceedings were concluded from asserting a prior dedication of the same land for public use as a street. *Ib.*
5. ESTOPPEL, AS BETWEEN GRANTOR AND GRANTEE. The rule is well established that the grantee is not estopped to deny the grantor's title, but this rule is not applicable to a case in which the only title asserted by the grantee is the precise title he has acquired from the grantor, nor to a case in which both parties claim from a common source and the title is identical in that source. *Wilcoxon v. Osborn*, 621.
6. A COUNTY having received the purchase money for a tract of swamp land, caused a deed to be made to the purchaser by the county commissioner. On the same day the county made a loan of school funds, taking as security a mortgage on the land. Subsequently the county caused the mortgage to be foreclosed. The defendant in this case derived title through this foreclosure. *Held*, that, as against the heirs of the original purchaser, the defendant was estopped to deny the validity of the commissioner's deed. *Ib.*

EVIDENCE.

1. **DEPOSITIONS** The deposition of a defendant taken in the cause may be read in evidence by plaintiff if relevant as an admission of defendant, though he is present and willing to testify. *Pomeroy v. Benton*, 64.
2. **RIGHT TO ADDUCE EVIDENCE.** The plaintiff being on the witness stand offered to testify in his own behalf that he had never used the money of the firm for his private benefit; but the referee refused to allow him. It was error in the referee afterward to report that the plaintiff had so used the money of the firm. *Ib.*
3. **WITNESS: COMPETENCY OF CHILD: PRACTICE IN SUPREME COURT.** Where a child under the age of ten years is presented as a witness, and the trial judge, upon personal inspection and oral examination, finds as a fact that the child is competent to testify, such finding will not be reviewed by this court, especially in a case where the examination as made is not preserved in the record. *The State v. Jefferson*, 136.
4. **DYING DECLARATIONS.** It is well settled that dying declarations are admissible as such only in cases of homicide, where the death of the declarant is the subject of the charge and the circumstances of the death are the subject of the dying declaration. *Ib.*
5. **THE trial court refused to permit a witness to say whether he had made a certain statement at the preliminary examination differing from one just made by him at the trial.** *Held*, error. *The State v. Hammond*, 157.
6. **PROVING TESTIMONY OF DECEASED WITNESS.** The court permitted witnesses to state the substance of the testimony of the prosecutrix given at the preliminary examination, she having since died. *Held*, no error. *Ib.*
7. **RAPE.** On a trial for rape the court refused to permit a witness who was present when the alleged offense was committed, to testify whether the woman objected or not. *Held*, error. *Ib.*
8. **PLEADING: EVIDENCE.** A party will not be permitted on the trial to give evidence contradicting his pleadings; nor can he state one ground of defense and recover on a different one. *Weil v. Posten*, 284.
9. **If illegal testimony be admitted, the effect of which cannot be determined, the judgment must be reversed and the cause remanded for a new trial.** *Ib.*
10. **WEIGHT OF EVIDENCE.** The evidence in this case did not so preponderate against the verdict as to justify the court in concluding that the jury were influenced by passion or prejudice, and, therefore, the objection that the verdict is against the evidence must be overruled. *The State v. Preston*, 294.

11. **SWORN STATEMENTS IN ANOTHER SUIT.** The sworn answers of a garnishee to interrogatories, are admissible in evidence against him in a suit by a stranger to the garnishment proceedings. *Ulley v. Tol-free*, 307.
12. **EXCEPTIONS TO EVIDENCE.** The Supreme Court will not consider the competency of evidence, where no exception is shown to have been taken to the action of the trial court in receiving the same. *The State v. Williams*, 310.
13. **EVIDENCE OF BAD CHARACTER.** Where the defendant offers evidence of his good character, the State may prove his admissions of facts impeaching his character. *Ib.*
14. **DEED OF TRUST: WRONGFUL ENTRY OF SATISFACTION: PAROL EVIDENCE TO AVOID IT.** The payee of a negotiable note secured by a deed of trust, after parting with his interest in the note, acknowledged satisfaction of the deed of trust on the margin of the record. In ejectment brought by a purchaser at a sale subsequently made by the trustee; *Held*, that he was not driven to a suit in equity to cancel the entry of satisfaction, but might show by parol evidence that the interest of the payee had expired, and, therefore, his power to acknowledge satisfaction.
Parol evidence to explain a record is always admissible. *Joerdens v. Schrimpf*, 383.
15. **ESTOPEL, RECITAL IN BOND.** A recital in a bond is a solemn admission by the obligor of the truth of the fact recited, and when, in an action against him, the bond is pleaded, *in haec verba*, the effect is the same as if there was a formal plea of estoppel. *The State ex rel. McKown v. Williams*, 463.
16. **EXPERT TESTIMONY.** Whether or not a sore on the neck of an ox renders him unfit for beef, is a proper question for expert testimony. *Branson v. Turner*, 489.
17. **BURDEN OF PROOF.** In an action on a contract of sale with warranty to recover the purchase money, the burden is not on the vendor to show fulfillment of the warranty, but on the vendee to show a breach if he alleges it. *Ib.*
18. **IDENTITY OF NAME** is competent evidence of identity of person. *La Riviere v. La Riviere*, 512.
19. **WITNESS, IMPEACHMENT OF.** An impeaching witness cannot be asked whether he would believe the former witness on oath; and it is specially objectionable to ask him whether from his own knowledge of the former witness he would believe him on oath. The inquiry should be as to his general reputation for truth and veracity in the community in which he lives. *The State v. Rush*, 519.
20. **COPIES.** A copy is not admissible in evidence, unless the absence of the original be accounted for. *Hoskinson v. Adkins*, 537.
21. ———. A recorder's certificate is not sufficient proof of a copy, where the original was improperly admitted to record. *Ib.*

22. **BACK TAXES: COLLECTOR'S CERTIFICATE, AS EVIDENCE.** Upon the trial of an action for the recovery of back taxes, a tax-bill certified to by the relator, as collector, was given in evidence, without objection. *Held*, that the judgment in his favor would not be set aside on the ground that there was no evidence that relator was the collector. *SHERWOOD, J., dissenting. The State ex rel. Wakefield v. Richardson, 589.*

— **OF THINGS HAPPENING AFTER THE FACT.** *Ely v. St. Louis, Kansas City & Northern Railway Company, 34.*

— **TAX LIST AS EVIDENCE OF OWNERSHIP.** *Kansas City v. Hannibal & St. Joseph Railroad Company, 180.*

— **PAROL EVIDENCE OF AGENCY TO INDORSE NOTE.** *Sauer v. Brinker, 289.*

EXECUTION.

1. **SHERIFFS: EXECUTION: FALSE RETURN: AMENDMENTS.** Under the statute, (R. S. 1879, § 2401,) an officer to whom an execution is delivered, in case he makes a false return on the writ, is liable for the whole amount of money directed to be levied. *Held*, that where the falsity consisted in stating that the writ was ordered to be returned satisfied by plaintiff's attorneys, an amendment by leave of court striking out the false statement was no defense to an action for the false return.
Corby v. Burns, 36 Mo. 194, distinguished on the ground that in that case the amendment was in conformity with the facts. The State ex rel. Ross v. Case, 247.
2. — : — : — : **INSOLVENCY.** A plea of insolvency of defendant in the execution, is no defense to an action against a sheriff and his sureties upon his official bond for making a false return. *Ib.*
3. — : — : **FAILURE TO RETURN: DAMAGES.** Where no damages are proven, a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law. *Ib.*
4. **OFFICER'S LIABILITY FOR LEVYING: PLEADING.** A sheriff is liable for an excessive sale, but not in an action wherein the petition charges only a wrongful levy, seizure and detention of the goods. *The State ex rel. Jones v. Martin, 670.*

FALSE PRETENSES.

1. **FORM OF INDICTMENT.** The form of indictment for obtaining money by false and fraudulent representations prescribed by section 1561, Revised Statutes 1879, is sufficient. Following the *State v. Fancher, 71 Mo. 460. The State v. Williams, 310.*
2. **CRUEL AND UNUSUAL PUNISHMENT.** Imprisonment in the penitentiary for two years is not a cruel or unusual punishment within the inhibition of section 25, article 2 of the Constitution of 1875. for the

crime of obtaining money by false and fraudulent representations under section 1561 of the Revised Statutes of 1879. *Ib.*

FORCIBLE ENTRY AND DETAINER.

TRESPASS: UNLAWFUL DETAINER: WASTE. The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled may recover as well the waste and injury committed as the possession. *Hawkins v. Roby*, 140.

FRAUD.

1. **FRAUD, MUST BE PROVEN.** When a plaintiff seeks relief against a contract on the ground of fraud, his action can only be maintained by proof of the fraud alleged. A finding that defendant is innocent of the fraud, followed by a judgment against him of \$15,350.60 $\frac{1}{2}$, is erroneous. If there was no fraud in any of the ways charged, that was the end of the matter. *Pomeroy v. Benton*, 64.
2. **A CASE OF FRAUD BY A TRUSTEE.** The testimony in the record strongly tends to show that: defendant deceived and misled the plaintiff's decedent by imposing upon him a false balance sheet of the business of the firm; that he fabricated the check of \$5,421.16 put in evidence by him, in connection with his purchase of whisky through Bowen & Co.; that after commencement of the suit he destroyed a book in which he kept the account of his whisky transactions to cut off investigation, and refused when examined as a witness to furnish information which he must have possessed touching said transactions, pretending he did not know and could not remember what reasonably he ought to have known and remembered. It belongs to a trustee charged with a breach of trust to explain and make clear whatever is uncertain or complicated in the matter. He should distinctly draw the line which separates his honest from his dishonest gains, or submit to unfavorable presumptions. *Ib.*
3. **ODIUM SPOLIATORIS.** No fitter case can be presented for the application of the rule *omnia præsumentur in odium spoliatoris*. *Ib.*
4. —: **SECONDARY EVIDENCE.** The referee erred in holding this rule inapplicable until secondary evidence has been given in place of the suppressed or destroyed testimony. This would nullify the rule. If a party is armed with secondary proof he has no need of presumptions. *Ib.*
5. —: **PRESUMPTIONS.** In such a case the court will enter into no minute calculations. The petition avers defendant by misuses of firm money made \$200,000 profit on whisky. The court will presume this to be true. One-half of that sum belongs to Pomeroy. A decree will be entered in favor of his administrator for \$100,000, with interest at six per cent per annum computed with annual rests to date of decree, but on the condition that plaintiff will abandon all claim on account of the voucher transactions. *Ib.*

6. **THE DEFENDANT BENTON FILED A PETITION FOR REHEARING.** After considering the petition the court modified its rulings as follows: (1) Though Egbert was not a partner, he was entitled to one-eighth of the profits, and seven-eighths of the profits only should be divided between the partners. (2) The court had erred in supposing the petition averred \$200,000 profit was made on whisky; the averment being in fact, that \$200,000 profit was made by defendant on whisky and other articles. (3) Though the rule in *odium spoliatoris* is justly applicable to defendant's conduct, the court on further consideration will presume the profits on whisky realized by defendant from misuse of firm money were only \$100,000. One-eighth of the amount would belong to Egbert, and \$43,500 to each partner. The decree will be entered against defendant for \$43,500, with interest at the rate of six per cent per annum computed with annual rests from January 1st, 1865, to date of decree; that is to say \$123,255, on condition that plaintiff release all further claim. *NORTON, RAY and SHERWOOD, JJ., concur; HOUGH, C. J., and HENRY, J., dissent. Ib.*
7. **PLEADING FRAUD.** A petition in an action grounded upon fraud must state the facts constituting the fraud. A mere allegation that the acts complained of were fraudulently done, is not sufficient: *Smith v. Sims*, 269.
8. **A PROBATE allowance may be vacated in a direct action for fraud;** but it must be fraud in procuring the allowance. The mere procurement of an illegal allowance by representing the claim to be a valid one, is not sufficient. *Ib.*
9. **BREACH OF WARRANTY.** Where there is a breach of warranty, the vendee may return the property and rescind the contract within a reasonable time, or he may retain it and when sued for the purchase money plead a total or partial failure of consideration. *Branson v. Turner*. 489.

— BY DIRECTORS AGAINST STOCKHOLDERS. *Bulkley v. Big Muddy Iron Company*, 105.

FRAUDULENT CONVEYANCES.

1. **INSURANCE POLICIES: ASSIGNMENT.** A parol assignment of a policy accompanied by delivery will vest in the assignee an equitable right, at least, to the proceeds. *Chapman v. McIlwraith*, 38.
2. — : — : —. As against creditors such a transfer to a wife will be valid, though made without consideration, if it is no more than a reasonable provision for her, unless it was made with intent to defraud the creditors. *Ib.*
3. **IF a debtor sells his goods in order to defraud his creditors, and the vendee purchases in order to aid in the perpetration of the fraud, the sale is void as against creditors, no matter what price was paid, or how early after the sale possession was taken, or how notorious the change of possession.** *Stone v. Spencer*, 356.

4. ATTACHMENT: EXEMPTION: BURDEN OF PROOF. Where the right of an attaching creditor is contested by a transferee of the debtor on the ground that the goods in controversy were exempt from attachment in the hands of the debtor; *Held*, that the burden of proving such exemption is on the transferee. *Ib*.
5. THE right to dispose of one's property for an honest purpose, is not terminated by indebtedness or insolvency; although such a disposition may or does have the effect of hindering or delaying creditors. *Dougherty v. Cooper*, 528.
6. BONA FIDE PURCHASERS. A sale made with the intent to hinder, delay or defraud creditors will not be held invalid against the purchaser, if he buy without notice of such intent, and for a valuable consideration paid before notice of the vendor's fraud. *Ib*.
7. ———. It is sufficient to invalidate a sale made with the intent to defraud creditors, that the purchaser knew of such intent. An instruction, therefore, requiring that he both know and be privy to the vendor's fraud, is faulty. *Ib*.
8. ———: NOTICE. The levy of an execution by a creditor of the vendor upon the goods sold and in the possession of the purchaser, is notice to him of imputed bad faith in the sale, and if he thereafter pay the purchase money, or any part thereof, he will not be deemed as to such payment an innocent purchaser without notice, if such sale was fraudulent. *Ib*.
9. ———: REPLEVIN. Where a purchaser pays part of the price before he has notice of the intent on the part of the vendor to defraud creditors by the sale, he is entitled to be protected to the extent of such payment. How such indemnity may be effectuated in the statutory action, in the nature of replevin, is considered. *Ib*.
10. AN instruction requiring the jury, before determining a sale to be fraudulent, to find that the vendor sold the goods with intent to hinder and delay his creditors; *Held*, error. *Ib*.
11. A sale made with the intent either to hinder or to delay creditors, is fraudulent; it is not necessary that the intent be to hinder and delay. *Rupe v. Alkire*, 641.
12. INSOLVENCY. Neither insolvency of the vendor, nor knowledge thereof by the purchaser, is a necessary ingredient in a fraudulent sale. *Ib*.
13. VENDEE'S LACK OF CAUTION: WILLFUL IGNORANCE. Mere want of caution in dealing with a fraudulent vendor will not implicate the vendee in the fraud. But if he knows enough of the purposes of the vendor to put a prudent man on inquiry, it will be his duty to make reasonable inquiry, and if he fails of this, he will be charged with notice of the fraud. *Ib*.
14. UPON the sale of a stock of goods to be paid for in land, the purchaser, at the instance of the vendor, conveyed the land to the minor children of the latter. *Held*, that this did not, of itself,

invalidate the sale of the goods; but if the vendor was insolvent the land might be subjected to the payment of his debts. *Ib.*

15. PREFERENCE, WHEN FRAUDULENT. A preference among creditors will not be held invalid for fraud on the part of the debtor alone. It must appear that the preferred creditor participated in the fraud. *Forrester v. Moore*, 651.
16. INSTRUCTIONS AS TO BONA FIDES. The *bona fides* of a transfer of personalty being in issue in this case, the court instructed the jury that in determining the question they should "consider all the facts and circumstances detailed in evidence." *Held*, that this was proper and sufficient, and the party alleging fraud was not entitled, under the conditions of this case, to instructions specifying in detail what facts or groups of facts were badges of fraud. *Ib.*
17. MORTGAGE. A debtor conveyed land to a trustee for the benefit of one of his creditors. Afterward the creditor consented that the land should be exchanged for a portable saw mill, on condition that the title to the mill should be vested in him, but the defendant should have possession of it, operate it and out of its earnings pay the creditor's demand. There was no agreement as to who should own the mill after the debt should be paid. The exchange was effected, a bill of sale for the mill taken in the name of the creditor, and the mill placed in possession of the debtor. *Held*, that the transaction did not amount to a mortgage of the mill, so as to require the bill of sale to be recorded, in order to be valid against other creditors of the debtor under section 8, page 281, Wagner's Statutes. Neither could it be regarded as a gift or sale by the debtor within the meaning of section 4, page 280, or section 10, page 281, Wagner's Statutes. *Ib.*
18. ONLY subsequent creditors can question the validity of a claim to personalty in the possession of a debtor by a third person, on the ground that the evidence of the latter's title is not recorded. *Ib.*
19. MINGLING OF GOODS. Where father and son combined together to defraud the creditors of the father by a transfer of his goods to the son, and the father afterward added other goods bought on credit in the name of the son, to the stock. *Held*, that these goods were liable for the debts of the father, notwithstanding the son was liable for the price of them. *The State ex rel. Jones v. Martin*, 670.

GARNISHMENT.

1. ATTORNEY'S NEGLIGENCE. A garnishee is bound by his attorney's negligence the same as any other defendant. *Fretwell v. Laffoon*, 26.
2. GARNISHEE'S LIABILITY ON NOTES. If the answer of a garnishee admits the execution of a note in favor of the defendant, and does not show that the note is negotiable or has been assigned to some person named, the plaintiff will be entitled to judgment on the answer. *Ib.*
3. PLEADING. A garnishee in his answer to interrogatories, must state facts and not conclusions of law. *Weil v. Posten*, 284.

4. **CONTINGENT LIABILITY OF GARNISHEE.** Where the answer of the garnishee shows that there is a contingency in which he may have funds of the debtor in his hands, it is error to discharge him before the contingency has been determined. *Ib.*
5. **ANSWERS TO INTERROGATORIES.** The sworn answers of a garnishee to interrogatories, are admissible in evidence against him in a suit by a stranger to the garnishment proceedings. *Uley v. Tolfree*, 307.

GUARDIAN AND WARD.

1. **SETTLEMENT OF DECEASED GUARDIAN'S ACCOUNTS: APPEAL.** An appeal from proceedings against the executor of a deceased guardian to compel him to settle the accounts of the guardianship, must be taken during the term or within ten days thereafter, as prescribed by the Administration Act, (Wag. Stat., p. 119, § 2; R. S. 1879, § 293,) and not within six months after the decision, as prescribed by the Guardian Act, (Wag. Stat., p. 681, § 50; R. S. 1879, § 2616). *Cissell v. Cissell*, 371.
2. **GUARDIAN'S BOND: LAW OF SISTER STATE.** A bond given in a probate court of this State, in conformity with a law of another state, by a guardian in this State of a ward resident here, in order to obtain possession of property of his ward located in the other state, is a valid bond, and an action may be maintained on it for property received in virtue of it. *The State ex rel. McKown v. Williams*, 463.
3. ———: ———. The validity of such bond is not affected by the fact that it contains a condition not required by the law of this State. *Ib.*
4. ———: ———. Such a bond is not essentially collateral or auxiliary to the ordinary guardian's bond; the ward may resort to either, certainly to the former when the makers of the latter are insolvent so that resort thereto would be unavailing. *Ib.*
5. ———: MEANING OF "ACCOUNT FOR." A condition in such a bond to "account for" the money received in the other state is not satisfied by the guardian charging himself therewith in his settlements, nor by anything short of payment. *Ib.*

HUSBAND AND WIFE.

1. **MARRIED WOMAN'S DEED.** A deed executed by a married woman without her husband, is void. *Sutton v. Casseleggi*, 397.
2. **INDIAN MARRIAGES.** The principles announced in *Johnson v. Johnson's Admr.*, 30 Mo. 72, and *Boyer v. Dively, Admr.*, 58 Mo. 510, in regard to the marriages of white persons with Indians, approved. *La Riviere v. La Riviere*, 512.
3. **A CONVEYANCE OF THE WIFE'S LAND,** executed and delivered by the husband and wife, will not pass her title, nor the husband's marital interest, unless it be acknowledged, and the acknowledged-

ment be certified, in the manner prescribed by statute. *Hoskinson v. Adkins*, 537.

4. A JUDGMENT AGAINST A MARRIED WOMAN, in a suit against her and her husband to foreclose a mortgage executed by them upon the land, which establishes no personal liability against her, but only charges the land with the debt, is not a judgment against her within the meaning and scope of the authorities which declare judgments in actions at law against married women to be void. *Fithian v. Monks*, 43 Mo. 502, and other cases distinguished *Id.*

PAROL ASSIGNMENT BY HUSBAND TO WIFE. *Chapman v. McIlwrath*, 38.

IDENTITY.

IDENTITY OF NAME is competent evidence of identity of person. *La Riviere v. La Riviere*, 512.

INDIANS.

INDIAN MARRIAGES. The principles announced in *Johnson v. Johnson's Admr.*, 30 Mo. 72, and *Boyer v. Dircky, Admr.*, 58 Mo. 510, in regard to the marriages of white persons with Indians, approved. *La Riviere v. La Riviere*, 512.

INFANCY.

INFANT: NOT LIABLE EX AEQUO ET BONO FOR SERVICES RENDERED. All the adult heirs at law to a tract of land affected by a will, united in employing attorneys to prosecute a suit to set the will aside, agreeing that in case of success, as compensation for their services, the attorneys should receive one-half of the land. Through the exertions of the attorneys the will was set aside. *Held*, that a minor heir, although benefited by the result equally with the others, was not bound either at law or in equity to contribute to the payment of the fee. *Dillon v. Bowles*, 603.

SELLING LIQUOR TO MINORS. *The State v. Amor*, 568.

INNOCENT PURCHASER.

1. NOT BOUND BY RETROSPECTIVE TAXATION. A general act provided for the levying of taxes on railroad property for back years. After its passage the North Missouri Railroad changed ownership. Its property had not been subjected to taxation during those years. After the purchase a levy was made under the new act. *Held*, that as against the new owner the levy was of no validity. He was an innocent purchaser, and the act was retrospective and void as to him. *Norton, J.*, dissented. *The State v. The St. Louis, Kansas City & Northern Railway Company*, 202.

2. ———: NOTICE. The levy of an execution by a creditor of the vendor upon the goods sold and in the possession of the purchaser, is notice to him of imputed bad faith in the sale, and if he thereafter pay the purchase money, or any part thereof, he will not be deemed as to such payment an innocent purchaser without notice, if such sale was fraudulent. *Dougherty v. Cooper*, 528.

INSTRUCTIONS.

1. ALTHOUGH some one out of a number of instructions given may be faulty, yet where the conclusion reached by the jury is manifestly right and a different result could not have been reached without injustice, the verdict ought not, on this account, to be disturbed. *Noble v. Blount*, 235.
2. To determine whether a judgment should be reversed for error in an instruction, it should be read in connection with the other instructions given in the case. *Ib.*
3. A judgment will not be reversed for error in an instruction given by the court of its own motion, when one given at the instance of appellant contains the same error. *Ib.*
4. INSTRUCTIONS are properly refused when there is no evidence on which to base them. *Uley v. Tolfree*, 307.
5. THE court again signifies its disapproval of the practice of asking numerous and voluminous instructions. *Ib.*
6. WHERE instructions are given which fairly present all the issues to the jury, and correctly declare the law, it is not error to refuse other instructions on the same subject. *Nugent v. Curran*, 323.
7. AN instruction which is inconsistent with the defense made or submits a defense not made by the answer, is properly refused. *Ib.*
8. MUST APPEAR IN THE RECORD. Unless the instructions given for respondent appear in the record, this court cannot inquire into the correctness of the action of the trial court in refusing instructions asked by appellant. *Greenabaum v. Millsaps*, 474.
9. IT is error to give instructions which are contradictory, or are not warranted by any evidence in the case. *Price v. The Hannibal & St. Joseph Railroad Company*, 508.
10. IT is error to submit a question to the jury in relation to which there is no evidence. *Chubbuck v. The Hannibal & St. Joseph Railroad Company*, 591.
11. AN instruction is erroneous which directs the jury to consider positive and affirmative evidence in preference to that which is negative and circumstantial. *Ib.*

12. AN INSTRUCTION, submitting a question of law to the court sitting as a jury, is properly refused. *The St. Louis, Kansas City & Northern Railway Company v. Cleary*, 634.
13. AN INSTRUCTION, which is, under the pleadings and evidence, a mere abstraction, is properly refused. *Ib.*

INSURANCE.

1. INSURANCE POLICIES: ASSIGNMENT. A parol assignment of a policy accompanied by delivery will vest in the assignee an equitable right, at least, to the proceeds. *Chapman v. McIlwraith*, 38.
2. ———: ———: HUSBAND AND WIFE. A husband may make such a transfer to his wife. *Ib.*
3. ———: ———: ———. As against creditors such a transfer to a wife will be valid, though made without consideration, if it is no more than a reasonable provision for her, unless it was made with intent to defraud the creditors. *Ib.*

INTOXICATING LIQUORS.

SEE DRAMSHOPS.

DRUGGISTS.

JEFFERSON CITY.

MAY MAINTAIN PERSONAL ACTION FOR TAXES. *City of Jefferson v. Curry*, 230.

JUDGMENT.

1. PROBATE JUDGMENT: COLLATERAL ATTACK: WANT OF CONSIDERATION. An order of the probate court allowing a note against the estate of a decedent cannot be assailed in a direct action on the ground that there was no consideration for the note. This is purely a matter of defense, and not the subject of affirmative relief. *Smith v. Sims*, 269.
2. ———: ———: FRAUD. Such an order may be vacated in a collateral action for fraud; but it must be fraud in procuring the allowance. The mere procurement of an illegal allowance by representing the claim to be a valid one, is not sufficient. *Ib.*
3. PROBATE ALLOWANCE: ACTION TO VACATE AND RECOVER PAYMENTS. After the executors of an estate had paid part of a claim allowed against the estate to the original claimant and another part to an assignee of the allowance, an action was brought by a judgment creditor of the estate to vacate the allowance and compel the re-

funding of the money paid. Both the original claimant and the assignee were made parties defendant. *Held*, that there was no error in this, as they had a joint interest in maintaining the integrity of the allowance; but *Held* also, that a joint judgment against both for the aggregate amount paid was error; the judgment should be limited to a recovery against each for the amount received by him; *Held* also, that the plaintiff could recover only so much as was due upon his judgment, and if there was a balance in the hands of the defendants it was not clear on what principle the court could order it paid into court. *Ib.*

4. JUDGMENT, AS RES ADJUDICATA. A stranger to a judgment cannot avail himself thereof by a plea of *res adjudicata*, nor as evidence upon the trial, in a suit between him and one of the parties thereto. Compare *St. Louis Mut. L. Ins. Co. v. Cravens*, 69 Mo. 72.

CASE ADJUDGED. In an action to recover various sums as for money loaned by plaintiff to defendant, the answer alleged the loan of a larger amount by defendant to plaintiff, and that the moneys claimed by plaintiff were in fact payments by him upon the loan, leaving a balance still due and unpaid to the defendant, and that such had been found to be the fact in a suit brought by a third party against the plaintiff and his wife to compel plaintiff to pay such loan, for which the third party had become liable by note to defendant at plaintiff's request and upon his agreement to pay the same, and that in this suit it had been adjudged that plaintiff should pay to defendant such unpaid balance. *Held*, that defendant, being a stranger to the proceedings in which said judgment was given, could not use it either as a bar or as evidence upon the trial in such action. *Henry v. Woods*, 277.

5. SCIRE FACIAS: MODE OF SERVICE. A *scire facias*, when issued to revive the lien of a judgment, should be served in the same manner as an ordinary summons. *Andrews v. Buckbee*, 428.
6. ———: APPEARANCE WAIVES DEFECTS. By appearing and pleading to a writ of *scire facias*, the defendant waives defects in service. *Ib.*
7. ———: JEOPAILS. A *scire facias*, though informal, will be good after judgment upon it, if it contains enough to show what judgment is intended to be revived. *Ib.*
8. JUDGMENT, AS RES ADJUDICATA. A party to an action who suffers judgment to go against him, cannot in a subsequent proceeding, either in equity or at law, cause such judgment to be reviewed by an allegation of the same facts which were adjudged insufficient, when set out in his answer, as a defense to the former action. *Caldwell v. White*, 471.

JUSTICE'S COURTS.

1. RECOUPMENT: COUNTER-CLAIM: JUSTICE'S JURISDICTION. In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages are not as great as claimed by plaintiff. This is strictly a defensive

recoupment and the justice has jurisdiction to entertain it, if he has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of the plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action, equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counter-claim, unless it has jurisdiction to entertain the cause of action, upon which the cross damages are claimed. If the real character of the cross demand is such that the justice could not entertain jurisdiction of it, if the defendants were suing upon it, then he certainly cannot entertain it, when asserted by a defendant before him, however close it may appear to be connected with plaintiff's cause of action. Neither can the true character of the cross demand be changed by the defendant declining to ask judgment for any possible excess in his favor. *Emery v. The St. Louis, Keokuk & Northwestern Railway Company*, 339.

2. TAKING an appeal from a justice of the peace having in his possession the docket of the justice before whom the suit was brought, is *prima facie* evidence of a transfer of jurisdiction from the one justice to the other. *Kronski v. The Missouri Pacific Railway Company*, 362.
3. JUSTICES' COURTS: COMPLAINT: APPEAL TO CIRCUIT COURT: AMENDMENT: CONVERSION. A statement filed in a justice's court was in the following form: "J. McM. Dr. to S.W. A., To nine sheep, \$25." *Held*, (1) That this was a sufficient statement of a claim for the conversion of the sheep; (2) That it was proper to allow the plaintiff, when the case reached the circuit court, to file an amended statement setting out his claim more fully. *Allen v. McMonagle*, 478.

LANDS AND LAND TITLES.

THE act of congress of April 29th, 1816, for the confirmation of certain land claims in Louisiana and Missouri, passed to the confirmee the legal title to land confirmed by the report of Recorder Bates, dated February 2nd, 1816. *Dean v. Bittner*, 101.

— WHAT ARE "CASES INVOLVING TITLE TO REAL ESTATE." *Baier v. Berberich*, 413.

LANDLORD AND TENANT.

1. A LEASE for years by one who is tenant in fee as to one undivided half and tenant for life as to the other undivided half of the premises, is valid as against the remainderman entitled to the latter half. *Sutton v. Casseleggi*, 397.
2. EJECTMENT: PARTIES: LANDLORD AND TENANT: DAMAGES. Tenants actually in possession, and not their landlord, are the necessary parties defendant to an action of ejectment. Under the statute though, the landlord may, on his own motion, be joined as a defendant. *Id*

3. WHERE tenants occupy separate parcels of land under a common landlord, they should be sued separately. If, however, they are sued jointly and there is judgment against them, the error will be immaterial, if the judgment is for possession with nominal damages only; otherwise, if substantial damages are awarded. *Ib.*
4. IN such case also there can be no recovery of substantial damages against a landlord joined as co-defendant with his tenants. *Ib.*

MANDAMUS.

1. CASES may arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief. *The State ex rel. Attorney General v. Kansas City, St. Joseph & Council Bluffs Railroad Company*, 143.
2. THE peremptory writ of mandamus must conform strictly to the alternative writ. *Overruling School District No. 1 v. Board of Education of Lamar*, 73 Mo. 627, and *O. V. & S. K. R. R. Co. v. Morgan Co. Ct.*, 53 Mo. 157. *Ib.*

MARRIAGE.

SEE HUSBAND AND WIFE.

MASTER AND SERVANT.

1. MASTER AND SERVANT: RAILROAD: NEGLIGENCE. In an action against a railroad company to recover for the death of a locomotive engineer killed while on duty, through the negligence of the train dispatcher, the plaintiff failed to show that the train dispatcher and the engineer were not fellow servants. *Held*, that for this omission the plaintiff was properly non-suited. *Blessing v. The St. Louis, Kansas City & Northern Railway Company*, 410.
2. PERILS OF THE SERVICE. Where a servant accepts employment knowing, as well as his employer, its perils, or continues in service after he acquires such knowledge, he has no claim for damages against the employer for an injury occasioned by such perils. *Price v. The Hannibal & St. Joseph Railroad Company*, 508.

MINES AND MINING.

PARTNERSHIP. Persons jointly conducting a mining venture are partners, though there is no agreement for a partnership. *Snyder v. Burnham*, 52.

MISTAKE.

— AS GROUND FOR NEW TRIAL. *Pretwell v. Laffoon*, 26.

MUNICIPAL CORPORATIONS.

1. **STREETS: CONDITIONAL DEDICATION.** A dedication for a street on condition that the street shall be extended by the neighboring proprietors without expense to the dedicator, and cannot be accepted by the city by instituting proceeding to condemn the land of the neighboring proprietors. Whether the dedicator should be charged with benefits for the extension would depend upon the charter of the city, and could not be controlled by agreement of the parties. *The City of St. Louis v. Meier*, 13.
2. ———: ———. A dedication can take effect only according to its terms. Hence, where land was dedicated for a street on condition that neighboring proprietors should dedicate the same street through their lands; *Held*, that the opening of the street, by the city by condemnation, through the other lands, did not amount to a fulfillment of the condition. *Ib.*
3. **STREET OPENING: ASSESSMENT OF BENEFITS.** The owners of land affected by the opening of a street, appeared before the commissioners appointed to open the street through neighboring lands, and consented to the opening through their land on condition that no benefits should be assessed against them; and the commissioners agreed; *Held*, that this arrangement was illegal, as tending to render the assessment of benefits against others unequal and partial. *Ib.*
4. ———; ———. Commissioners appointed to open a street through lands adjoining the lands of the heirs of K. omitted to assess benefits against them on the ground that they had agreed that the street should be opened through their land and that the value of the land occupied by the extension would be equal to the benefits. *Held*, that the commissioners had no right to take this into consideration, and their having done so invalidated the assessment made against other land holders. *Ib.*
5. ———; ———. A conveyance of property sought to be condemned for a street, made after the institution of proceedings to open the street and with the purpose of enabling the grantor to escape an assessment of benefits, is properly disregarded by the commissioners. *Ib.*
6. **REMOVAL OF DEAD ANIMALS IN CITIES: CONSTITUTIONAL LAW.** Under the constitution of this State, a city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they become a nuisance. *The River Rendering Company v. Behr*, 91.
7. **RAILROAD TRACK IN PUBLIC STREET: LIABILITY OF COMPANY FOR DAMAGES.** Where a municipality, being authorized by its charter, confers upon a railroad company the right to lay its track in a street, the right is to lay it on the grade of the street. If embankments are raised by the company to lay the track upon, above the grade, the company will be liable to property holders in damages for obstructing the access to their property. *Cross v. The St. Louis, Kansas City & Northern Railway Company*, 318.

8. **DUTY TO KEEP STREETS SAFE.** The law imposes on municipal corporations the duty of keeping their streets in a reasonable safe condition for the convenience of travel. Failing in this, they become liable for all resulting injuries. *Loewer v. The City of Sedalia*, 431.
9. **COUNTY BONDS: CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS.** The fact that county bonds held void by the courts of this State are held valid by the courts of the United States, and, therefore, when transferred to a non-resident holder may be enforced against the county, will not authorize the courts of this State to require a resident holder of such bonds to deliver them up to be cancelled. *Dallas County v. Merrill*, 573.

WATER LICENSE, FORCED PAYMENT OF. *Westlake & Button v. City of St. Louis*, 47.

MUNICIPAL TAXES, IRREGULAR LEVY OF. *The Town of Warrensburg ex rel. Colburn v. Miller*, 56.

NATIONAL BANKS.

1. **DEALINGS WITH REAL ESTATE: TRUSTS.** To avoid the supposed effect of certain provisions of the National Banking Act, a national bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee for a receiver of the bank, so far from being a fraud upon his individual creditors, was an execution of the trust which, if it had been refused, a court of equity would have compelled. *Wherry v. Hale*, 20.
2. ———: ———. National banks are authorized to hold and convey such real estate as they shall purchase at sales under judgments, decrees or mortgages held by them to secure debts due them. *Ib.*
3. ———: ———: **ULTRA VIRES.** If a national bank violates the National Banking Act in dealing with real estate, the remedy is in the hands of the government only. A stranger to the transaction cannot impeach it. *Ib.*

NEGLIGENCE.

1. **PLEADING NEGLIGENCE.** In an action founded upon negligence, it is not necessary for the plaintiff, in his petition, to set out the facts constituting the negligence. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently and carelessly done, will suffice. *Mack v. The St. Louis, Kansas City & Northern Railway Company*, 232.
2. ———: **PRACTICE.** A general charge that the defendant "negligently killed" plaintiff's horse, if not objected to before trial, will be sufficient to let in proof of any act whatever on the part of the defendant which caused the killing or contributed thereto. *Ib.*

3. MUNICIPAL CORPORATIONS; DUTY TO KEEP STREETS SAFE. The law imposes on municipal corporations the duty of keeping their streets in a reasonably safe condition for the convenience of travel. Failing in this, they become liable for all resulting injuries. *Loewer v. The City of Sedalia*, 431.
4. KNOWLEDGE OF DANGER. The mere fact that a person attempting to cross a bridge on a dark night knows that it is not provided with a railing, will not prevent him from recovering damages for injuries sustained in falling from the bridge if he falls without fault or negligence on his own part. *Ib.*
5. DANGER SIGNALS. Whether the want of a warning light at a bridge at night, tends to establish negligence, depends upon the character of the danger, as arising from the situation, condition and use of the bridge, and is properly a question of fact for the jury. *Ib.*
6. QUESTION OF FACT. Where the question was whether plaintiff was guilty of contributory negligence in using a dangerous sidewalk when he might have walked in the roadway; *Held*, that this was for the jury, and not the court, to determine. *Ib.*
7. "AND." In an action for negligence defendant pleaded contributory negligence growing out of plaintiff's intoxication. At the plaintiff's instance, the court instructed that the burden of proof rested on defendant to show that plaintiff's injury resulted from his intoxication and negligence. *Held*, that this meant negligence superinduced by intoxication, and the instruction was, therefore, not misleading. *Ib.*
8. ———: ———: ACTION AT COMMON LAW FOR DAMAGE TO CATTLE. In a common law action against a railroad company for negligently killing cattle, the plaintiff may prove any negligence of the company tending to produce the injury, including in a case where the killing occurred at a public crossing, failure of the company to ring the bell or sound the whistle. *Braxton v. The Hannibal & St. Joseph Railroad Company*, 455.
9. An instruction that it was the duty of plaintiff when approaching the railroad crossing to stop, look and listen for an approaching train, and that if he did not do so in time to prevent the collision, then the jury must find for defendant, was *held* to be objectionable in not requiring the jury to find as a further condition that plaintiff, by stopping, looking and listening, could have discovered the train in time to have avoided the collision. *Johnson v. The Chicago, Rock Island & Pacific Railway Company*, 546.

NEGOTIABLE INSTRUMENTS.

SEE BILLS OF EXCHANGE.

PROMISSORY NOTES.

NOTICE.

HOW SERVED ON CORPORATIONS. Heltzell v. The Chicago & Alton Railroad Company, 315: Heltzell v. The Kansas City, St. Louis & Chicago Railroad Company, 482. See also Johnson v. Wilson, 639.

NUNC PRO TUNC ENTRIES.

NUNC PRO TUNC JUDGMENTS: VALIDITY AS AGAINST STRANGERS: SURETIES IN APPEAL BOND. In order that a *nunc pro tunc* entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry made and an opportunity to appeal therefrom. *Koch v. The Atlantic & Pacific Railroad Company*, 354.

OFFICE AND OFFICER.

OFFICER SERVING LEGAL PROCESS. In order that an officer may justify under process, it is essential that jurisdiction be possessed by the court or tribunal from which the process emanates, and that it be fair on its face. *The Town of Warrensburg ex rel. Colbern v. Miller*, 56.

LIABILITY OF SHERIFF FOR FALSE RETURN—FOR FAILURE TO RETURN. State ex rel. Ross v. Case, 247.

LIABILITY OF TAX COLLECTOR ENFORCING WRITS. Higgins v. Ausmuss, 351.

OLEOMARGARINE.

See *The State v. Addington*, 110.

PARTIES.

JOINT DEFENDANTS: SEVERAL JUDGMENTS. After the executors of an estate had paid part of a claim allowed against the estate to the original claimant and another part to an assignee of the allowance, an action was brought by a judgment creditor of the estate to vacate the allowance and compel the refunding of the money paid. Both the original claimant and the assignee were made parties defendant. *Held*, that there was no error in this, as they had a joint interest in maintaining the integrity of the allowance; but *Held* also, that a joint judgment against both for the aggregate amount paid was error; the judgment should be limited to a recovery against each for the amount received by him; *Held* also, that the plaintiff could recover only so much as was due upon his judgment, and if there was a balance in the hands of the defendants it was not clear on what principle the court could order it paid into court. *Smith v. Sims*, 269.

PROPER PARTY TO SUE FRAUDULENT DIRECTORS. *Bulkley v. Big Muddy Iron Company*, 105.

PROPER PARTIES DEFENDANT IN TAX CASES. *Kansas City v. Hannibal & St. Joseph Railroad Company*, 180.

PARTITION.

PARTIES TO PARTITION SUIT. In a suit in the nature of an equitable partition between beneficiaries under a will providing that they should account for, and their respective shares in the estate should be diminished by, the amount of their notes, or the notes of their husbands, held by the testator; *Held*, that the husbands were proper parties to the suit, for the purpose of ascertaining the extent of their indebtedness and determining the distributive interests of the beneficiaries. *Hill v. Alexander*, 296.

PARTNERSHIP.

1. IN MINING. Persons jointly conducting a mining venture are partners, though there is no agreement for a partnership. *Snyder v. Burnham*, 52.
2. SURVIVING PARTNER: POWER TO BIND ESTATE OF DECEASED. A surviving partner has no power to bind the estate of the deceased partner by new contracts, unless expressly authorized so to do by the deceased either by will or contract. *The Exchange Bank v. Tracy*. 594.
3. In the present case there was no such authority. *Ib.*
4. ———: CONTINUATION OF OLD FIRM. A clause in a will providing for the continuation of a firm of which the testator was a member, does not, of itself, continue the old firm or create a new one. To give it effect, the surviving partner must assent and continue the business with that understanding and intention. *Ib.*

FRAUD BY PARTNER AGAINST HIS CO-PARTNER. *Pomery v. Benton*, 64.

PLEADING.

1. "LEGAL CAPACITY TO SUE." The rule that the question of the plaintiff's legal capacity to sue must be raised either by demurrer or by answer, and if not so raised is to be deemed waived, does not apply alone to cases of infancy, coverture, lunacy and the like. It applies to all cases where the plaintiff though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name. *Bulkley v. Big Muddy Iron Company*, 105.
2. CASE ADJUDGED: CORPORATION: ACTION AGAINST DIRECTORS FOR FRAUD. Where the petition in a suit brought by a stockholder against certain directors of a corporation for a fraudulent breach of

trust in dealing with the corporate property, failed to show either that the corporation had refused to sue or that it was under the control of the defendant, but no objection was made on that score until the case reached this court, *Held*, that it could not then be sustained, though if made in time it would have been. *Ib.*

3. PLEADING NEGLIGENCE. In an action founded upon negligence, it is not necessary for the plaintiff, in his petition, to set out the facts constituting the negligence. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently and carelessly done, will suffice. *Mack v. The St. Louis, Kansas City & Northern Railway Company*, 232.
4. NEITHER ESTOPPEL NOR RATIFICATION CAN BE PROVED WITHOUT BEING PLEADED. *Noble v. Blount*, 235.
5. PLEADING FRAUD. A petition in an action grounded upon fraud must state the facts constituting the fraud. A mere allegation that the acts complained of were fraudulently done, is not sufficient. *Smith v. Sims*, 269.
6. A party will not be permitted on the trial to give evidence contradicting his pleading nor can he state one ground of defense and recover on a different one. *Weil v. Posten*, 284.
7. GARNISHMENT: PLEADING. A garnishee in his answer to interrogatories, must state facts and not conclusions of law. *Ib.*
8. AMENDMENT. There is no substantial difference between the original and amended petitions in this case. *Utley v. Tolfree*, 307.
9. ALLEGATA ET PROBATA. An answer construed and held to plead a parol agreement between the parties: by plaintiff, to cancel defendant's notes given upon the purchase of land: by defendant, to surrender possession of the land to the plaintiff: and a performance by defendant of his part of the agreement. Evidence examined and held not to be at variance with the pleading. *Russell v. Berkstresser*, 417.
10. ———. An answer alleged that in pursuance of an agreement by plaintiff to cancel defendant's notes, and by defendant to surrender the possession of certain premises, defendant permitted plaintiff to take possession thereof, and to have the improvements and betterments. *Held*, that the answer contained an indirect allegation that it was part of the agreement, that plaintiff should have the improvements, and that under such allegation it was competent to show that there were improvements, and the character of them. *Ib.*
11. JEOPAILS. If the facts requisite to constitute a cause of action are necessarily inferable from the petition taken in its entirety, though informal in its parts, it is good after verdict. *The State ex rel. McKown v. Williams*, 463.
12. ———: ANSWER, NEW MATTER. An answer averring conclusions of law from facts already stated in the petition, does not set up new matter, and does not require a reply. *Ib.*

13. ——— : ——— : WAIVER. Although the answer sets up new matter and the plaintiff fails to reply, yet if the case is tried as if the new matter was in issue, this court will treat it as if a reply had been filed. *Ib.*
 14. ESTOPPEL: RECITAL IN BOND. A recital in a bond is a solemn admission by the obligor of the truth of the fact recited, and when, in an action against him, the bond is pleaded *in haec verba*, the effect is the same as if there was a formal plea of estoppel. *Ib.*
 15. ¹It is manifest error to give judgment for the plaintiff for the whole of the premises in controversy, when his own evidence shows that a part of the title is vested in others. *Price v. The Inhabitants of the Town of Breckenridge*, 447.
 16. TRUSTEE OF AN EXPRESS TRUST: CONSIGNOR SUING AS SUCH. The plaintiff, having sold land as agent of the owner and received the purchase money, delivered the latter to an express company for transportation to the owner. It was lost in transit. *Held*, that the plaintiff could maintain an action for its recovery. He was the "trustee of an express trust," within the meaning of section 3463, Revised Statutes 1879. *Snider v. The Adams Express Company*, 528.
 17. PLEADING EXECUTION OF BOND. A petition alleged that the defendants "by their certain writing obligatory * * * sealed with their seals, became bound unto * * * in the sum of * * * for the just payment of which they bound themselves." *Held*, that it sufficiently averred the execution of the bond by defendants. *The State ex rel. Phillips v. Rush*, 586.
 18. THE ANSWER. Whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out. *Kersey v. Garton*, 645.
 19. OFFICER'S LIABILITY FOR LEVYING: PLEADING. A sheriff is liable for an excessive sale, but not in an action wherein the petition charges only a wrongful levy, seizure and detention of the goods. *The State ex rel. Jones v. Martin*, 670.
- COMPLAINTS AGAINST RAILROADS FOR KILLING STOCK. *Terry v. Missouri Pacific Railway Company* 254.
- IN ACTIONS ON BILLS OF EXCHANGE. *Taylor v. Newman*, 257.
- RECOUPMENT AND COUNTER-CLAIM. *Emery v. The St. Louis, Keokuk & Northwestern Railway Company*, 339.

PLEADING, CRIMINAL.

- I. INDICTMENT MUST BE SIGNED. Under the present statute, (R. S. 1879, § 1798,) an indictment not signed by the prosecuting attorney, is a nullity. *The State v. Bruce*, 193.

2. **AN INDICTMENT FOR SELLING LIQUOR**, unlawfully, charged the selling to have been done "on or about the months of January, February and March." *Held*, that it was not open to the objection that it charged several offenses in one count, time not being of the essence of the offense. *The State v. Findley*, 338.
3. **INDICTMENT FOR ASSAULT**. An indictment charged substantially that defendant, at, etc., "feloniously one John Key with large stones, and did beat, wound and inflict great bodily harm on him the said Key." *Held*, not obnoxious to the charge of being vague, uncertain, illegible and unintelligible, although it also contained some useless verbiage, and was otherwise inartificially drawn. *The State v. Weeks*, 496.
4. ———: **DEMURRER**. A motion to quash, or a demurrer to, an indictment, which only alleges that the indictment does not set forth any offense, is sufficiently specific under section 1818, Revised Statutes of 1879. In so far as they declare otherwise, the following cases are overruled: *State v. Houten*, 37 Mo. 357; *State v. Berry*, 62 Mo. 595, and *State v. Poston*, 63 Mo. 521. *Ib.*
5. **FELONIOUS ASSAULT TO KILL**. The indictment in this case charging a felonious assault with intent to kill, punishable under section 29, page 449, Wagner's Statutes; *Held*, to be good under that section. *The State v. Webster*, 566.

INDICTMENT FOR RAPE. *The State v. Hammond*, 157.

POLICE POWER.

See *The State v. Addington*, 110.

POWERS.

——— **OF SALES IN DEEDS OF TRUST**. *White v. Stephens*, 452.

PRACTICE.

1. **NEW TRIAL: SURPRISE**. "Surprise," as used in the statute in relation to new trials, (R. S. 1879, § 3704,) denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection. If there is any element of negligence in the case there is no surprise. *Fretwell v. Laffoon*, 26.
2. ———: **MISTAKE**. Mistake growing out of forgetfulness or heedlessness is not such mistake as will authorize a new trial under this section of the statute. *Ib.*
3. ———: **CASE ADJUDGED**. The answer of a garnishee admitted that he had executed two notes in favor of Daniel Hibler, the defendant, both of which were secured by a recorded deed of trust, and one of which was paid. A year afterward judgment was rendered

against him on this answer for the amount of the second note. In the meantime he had paid this note. Both notes were in point of fact payable to *Samuel Hibler* and not to *Daniel Hibler*. The garnishee moved for a new trial alleging these facts and also that he had not discovered the mistake in his answer till after the judgment. The motion was sustained by the trial court. *Held, error. Ib.*

4. INSTRUCTIONS. It is a fatal error to submit to the jury a case not made in the pleadings. *Ely v. The St. Louis, Kansas City & Northern Railway Company*, 34.
5. MOTION FOR NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence is properly overruled when the affidavit in support of the motion fails to disclose legal diligence to discover the evidence before trial, or when the evidence is merely cumulative. *Snyder v. Burnham*, 52.
6. REMANDING CAUSE WITH SPECIAL DIRECTIONS TO TRIAL COURT. When on hearing a cause in the Supreme Court a defendant is found to be a fraudulent trustee; and the cause is remanded with instructions to require him to account as such; the sole duty of the circuit court, or its referee, is to comply with the mandate; and neither the law or the fact adjudged by the Supreme Court can be re-tried below. *Pomeroy v. Benton*, 64.
7. REFEREE'S REPORT. The report of a referee need not be approved in express terms. If exceptions are filed to the report and overruled, that is a sufficient approval of the report. *Ib.*
8. WRIT OF ERROR CORAM VOBIS: IMPRISONMENT OF PERSON UNDER EIGHTEEN IN PENITENTIARY. It is well settled that for an error in fact in the proceedings of a court of record, a writ of error *coram vobis* will lie to revoke the judgment, whether it be a court of civil or criminal jurisdiction. Thus, where a person under the age of eighteen years is sentenced to the penitentiary, the court may at any time, upon being advised of the fact, revoke the sentence and commit the prisoner to jail. The usual way of bringing such matters before the court, according to the practice in this State, is by motion supported by affidavit or evidence. *Ex Parte Gray*, 160.
9. JUDGMENT. In finally disposing of a case the court should render judgment either for or against every party to the record. *McCord's Administrator v. McCord*, 166.
10. FAILURE TO OBJECT TO PLEADINGS. A general charge that the defendant "negligently killed" plaintiff's horse, if not objected to before trial, will be sufficient to let in proof of any act whatever on the part of the defendant which caused the killing or contributed thereto. *Mack v. The St. Louis, Kansas City & Northern Railway Company*, 232.
11. EXCEPTIONS TO COMPETENCY OF WITNESSES. The exclusion of a witness, upon a specific objection as to his competency, will not be considered by the Supreme Court, unless an exception be saved to the ruling of the trial court, and its attention be called to the matter in the motion for a new trial. *Hill v. Alexander*, 296.

12. **THE MOTION FOR A NEW TRIAL.** To enable the Supreme Court to consider the questions presented by the motion for new trial, it is not necessary that the filing of the motion and the action of the court thereon appear in what is known as the record proper; it is sufficient if they appear in the bill of exceptions. *The State ex rel. Estes v. Gaither*, 304.
13. **NEWLY DISCOVERED EVIDENCE**, on which a motion for a new trial was based in this case; *Held*, cumulative and trivial. *Stone v. Spencer*, 356.
14. **WHERE a case is tried by the court below without a jury**, this court cannot say that a declaration by the trial court that upon the pleadings and the evidence the plaintiff was not entitled to recover, was error, without holding that the finding and judgment were not warranted by the law and the evidence. *Ib.*
15. **DEFECTIVE SERVICE: WAIVER.** A defect in the service of a summons is waived by appearance and submission to the trial of the cause upon its merits, notwithstanding a motion to dismiss because of such defect be first made and overruled. *Kronski v. The Missouri Pacific Railway Company*, 362.
16. **——: MISNOMER: JUDGMENT.** Service of process in favor of the right party by a wrong name, is good, and a judgment in favor of the right party by his proper name will after trial cure a misnomer in the complaint, summons or prior proceedings. *Ib.*
17. **APPEALS.** If an appeal be not taken in time the appellate court has no power to make any order in the case except to dismiss the appeal or strike the case from the docket. It cannot inquire into the jurisdiction of the lower court. *Cissell v. Cissell*, 371.
18. **ORDER OF PROOF.** The order of proof is largely within the discretion of the trial court. It is not error to receive evidence of a parol agreement concerning land before any evidence is given of the acts of performance relied upon to meet the objection that, under the statute of frauds the agreement must be in writing. *Russell v. Berkstresser*, 417.
19. **JUSTICES' COURTS: COMPLAINT: APPEAL TO CIRCUIT COURT: AMENDMENT: CONVERSION.** A statement filed in a justice's court was in the following form: "J. McM. Dr. to S.W. A., To nine sheep, \$25." *Held*, (1) That this was a sufficient statement of a claim for the conversion of the sheep; (2) That it was proper to allow the plaintiff, when the case reached the circuit court, to file an amended statement setting out his claim more fully. *Allen v. McMonagle*, 478.
20. **AMENDMENT OF JUDGMENT.** Pending a motion in arrest, it is not error to permit a dismissal as to a married woman and a corresponding amendment of a judgment which has been rendered against such woman and other defendants. *La Riviere v. La Riviere*, 512.
21. **EVEN where there is some evidence which might justify the trial court in submitting the case to the jury**, yet if the whole evidence taken together is such that if it had been submitted and the jury had found a verdict for plaintiff, it would have been the duty of

the trial court to order a new trial, this court will not reverse for a refusal so to submit. *Landis v. Hamilton*, 554.

22. **MOTION FOR NEW TRIAL: EVIDENCE: INSTRUCTIONS.** This court will not inquire into the action of the trial court in excluding evidence or refusing instructions, unless complaint be made of such action in the motion for new trial. *The State ex rel. Wakefield v. Richardson*, 590.

PRACTICE, CRIMINAL.

1. **INSTRUCTIONS AS TO PUNISHMENT.** An instruction over-stated the maximum fine and omitted to state the minimum term of imprisonment for defendant's offense. The punishment assessed by the jury was within the limit prescribed by law both as to fine and imprisonment. *Held*, nevertheless, that for the error in the instruction the judgment of conviction must be reversed. *The State v. Sands*, 118.
2. **THE fact that instructions asked by defendant and refused in a criminal case, are lost so that they cannot be examined by this court, is no ground for reversing a judgment of conviction, especially where it appears that sufficient instructions were given by the court.** *The State v. Jefferson*, 136.
3. **NEWLY DISCOVERED EVIDENCE.** A judgment of conviction will be reversed where the trial court refuses to grant a new trial asked on the ground of newly discovered evidence which is relevant and important, and which could not have been discovered until after the trial. *The State v. Curtis*, 267.
4. **OBJECTIONS to instructions will not be considered by this court unless they were made in the motion for new trial.** *The State v. Preston*, 294.
5. **A remark of the prosecuting attorney construed by the court as having no reference to the failure of the defendant to be sworn on his own behalf, and, therefore, no violation of the statute.** *Ib.*

PRACTICE IN THE SUPREME COURT.

1. **EQUITY: PRACTICE.** In equity cases the Supreme Court will defer to some extent to the trial courts in their findings on matters of fact. *Chapman v. McIlwath*, 38.
2. **THIS court will not review the action of the trial court sitting as a trier of fact in a law case.** *Snyder v. Burnham*, 52.
3. **THIS court will not consider an objection to evidence not made at the trial.** *The City of Kansas v. The Hannibal & St. Joseph Railroad Company*, 180.
4. **THIS court will not consider the competency of evidence, where no exception is shown to have been taken to the action of the trial court in receiving the same.** *The State v. Williams*, 310.

5. **WHAT IS NOT A CASE IN EQUITY: EQUITY OF REDEMPTION: EVIDENCE.** In a suit upon notes given by defendant to plaintiff for land, which, the notes being due and unpaid, the plaintiff sold in virtue of a power of sale contained in the mortgage securing the same, and bid in for himself through the intervention of a third party, the defense was an executed parol agreement on the part of the defendant to surrender the possession of the land, and to waive and surrender all right of redemption, in consideration of the cancellation of the notes. *Held*, that the equity of redemption involved did not make this an equity case: and being an action as at common law, the Supreme Court would not weigh the evidence. *Russell v. Berkstresser*, 417.
6. ———. The Supreme Court will not reverse on the ground that, in an action as at common law, a verdict is against the weight of evidence, where there is not an absolute failure thereof. *Ib.*
7. **INSTRUCTIONS.** Unless the instructions given for respondent appear in the record, this court cannot inquire into the correctness of the action of the trial court in refusing instructions asked by appellant. *Greenabaum v. Millsaps*, 474.
8. **FORECLOSURE OF MORTGAGE.** An action under the statute for the foreclosure of a mortgage, is one at law and not in equity. Hence, where the case is tried by the court without a jury and no declarations of law are asked or given, if there is evidence to support the judgment below, there is nothing for this court to review. *Smith v. Finn*, 499.
9. **IMMATERIAL ERRORS.** Errors not materially affecting the merits of an action, furnish no ground for reversing the judgment. *Hoskinson v. Adkins*, 537.

PRESUMPTIONS.

1. **PRESUMPTION OF HONESTY.** Where a transaction is as compatible with honesty as with dishonesty, it will be presumed to be honest. *Chapman v. McIlwraith*, 38.
2. **PRESUMPTION OF DEATH FROM ABSENCE.** There is no presumption of law that a man who disappeared at an unknown date in the year 1809, was dead on the 29th day of April, 1816. *Dean v. Bittner*, 101.

——— **IN ODIUM SPOLIATORIS.** *Pomeroy v. Benton*, 64.

PRINCIPAL AND AGENT.

PAROL EVIDENCE OF AGENCY TO INDORSE NOTE. *Sauer v. Brinker*, 289.

PRINCIPAL AND SURETY.

1. **REPLEVIN: SURETIES.** If a surety in a replevin bond given by an administrator pay a judgment in the action against the adminis-

- trator, he will be entitled to recover the amount from the sureties in the probate bond of the administrator. *The State to the use of Walsh v. Farrar*, 175.
2. A surety cannot recover of his principal if he pays the debt with knowledge of facts which would discharge himself or his principal, or if, to shield himself against liability in another direction, he procures the surrender to himself of the obligation of his principal. *Noble v. Blount*, 235.
 3. NUNC PRO TUNC JUDGMENTS: VALIDITY AS AGAINST STRANGERS: SURETIES IN APPEAL BOND. In order that a *nunc pro tunc* entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry made and an opportunity to appeal therefrom. *Koch v. The Atlantic & Pacific Railroad Company*, 354.

EXHIBITION OF SURETY'S DEMAND AGAINST ESTATE OF DECEASED PRINCIPAL. *Burckhardt v. Helfrich*, 376.

PROCESS.

— WHEN NO PROTECTION TO OFFICER SERVING IT. *The Town of Warrensburg ex rel. Colbern v. Miller*, 56; *Higgins v. Ausmuss*, 351.

PROMISSORY NOTES.

NEGOTIABLE PAPER: SET-OFF. A negotiable promissory note transferred after maturity passes into the hands of the indorsee subject only to such equities and defenses as are connected with the note itself, not such as grow out of distinct and independent transactions. The statute of set-off, (R. S. 1879, § 3868,) is not applicable to negotiable paper. Overruling *Munday v. Clements*, 58 Mo. 577. *Cutler v. Cook*, 388.

— PAROL EVIDENCE OF AGENCY TO INDORSE. *Sauer v. Brinker*, 289.

PUBLIC FUNDS.

1. COUNTY AND TOWNSHIP FUNDS: ACTION BY THE STATE TO RECOVER. Under the laws now in force, county funds are the property of the county and not of the State, and the State has no right to sue for their recovery, except in actions brought to the use of the county on bonds of officers, which are by law required to be given to the State to the use of the county. Except in such cases, the suit should be in the name of the county. Where township organization is in force, the same rules apply to township funds. *The State v. Rubey*, 610.
2. STATE FUNDS: ACTION FOR. The State cannot maintain an action for her own funds until default has been made in paying the same into the State treasury. *Ib.*

3. **PUBLIC FUNDS DEPOSITED IN BANK.** The State cannot maintain an action against a bank in which the county treasurer has deposited public money, except by way of garnishment on execution against the treasurer, or perhaps, where there has been fraudulent collusion between the bank and the treasurer, and he and his sureties are insolvent, by a proceeding in equity to follow the funds in the hands of the bank. *Ib.*
4. ———. The act of February 11th, 1881, (Sess. Acts 1881, p. 35,) does not authorize such an action. *Ib.*
5. ———: "LOANING OUT." The prohibition found in section 1327, Revised Statutes, against public officers' "loaning out" the public moneys, does not forbid the depositing of such moneys in bank. *Ib.*

PUBLIC USE.

——— DEDICATION TO. *Price v. The Inhabitants of the Town of Breckenridge*, 447.

QUESTIONS OF LAW AND FACT.

See *Loewer v. The City of Sedalia*, 431.

QUO WARRANTO.

QUO WARRANTO. In a *quo warranto* proceeding this court will not enter into an inquiry as to the legality of votes or the qualifications of voters. The statute provides another tribunal and a different mode of determining these matters, and this provision is exclusive. *The State ex rel. The Attorney General v. Mason*, 189.

RAILROADS.

1. **PRACTICE: INSTRUCTIONS MUST RELATE TO THE PLEADINGS: RAILROAD.** It is a fatal error to submit to the jury by instruction a case not made in the pleadings. Hence, where the petition in an action against a railroad company for personal injuries alleged as the ground of plaintiff's claim, negligence on the part of the company in running its train over a portion of its track which had been undermined and rendered dangerous by a flood of water; and the court upon the trial gave an instruction which permitted a recovery for defects in the road-bed or in the ties or materials used on the road. *Held*, that the judgment must be reversed. *Ely v. The St. Louis, Kansas City & Northern Railway Company*, 34.
2. **RAILROADS: SUBSEQUENT FACTS NOT TO BE CONSIDERED BY THE JURY.** In an action against a railroad company for injuries sustained by a passenger in an accident caused by an embankment on the company's road being undermined by a rain-storm of unprecedented violence, it appearing that since the accident the embankment had been so altered as to provide against a recurrence of such storms,

the company asked, but the trial court refused, an instruction that the jury were not to take this fact into consideration. *Held*, that this was error. *Ib.*

3. **DUTY OF RESPONDENT TO RUN TRAINS TO SAVANNAH.** Under the charter of the Missouri Valley Railroad Company and its successor, the Kansas City, St. Joseph & Council Bluffs Railroad Company, and the acts amendatory thereof, the latter company is bound to maintain railroad connection between the cities of St. Joseph and Savannah and to run a train of cars daily between those points; but it is not bound to make Savannah a point on its main track or to run all its trains to the old depot at that place. In maintaining a switch from this depot to the depot on the new line located and established under and by authority of the amendatory act of 1871, and running a train of cars daily over this switch to the old depot, the company sufficiently complies with the law. *The State ex rel. Attorney General v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 143.
4. **KILLING STOCK : PLEADING.** In an action under the 43rd section of the Railroad Law, (R. S., § 809,) it is not essential that the complaint shall allege that the failure to fence occasioned the injury.
A complaint alleged that the animal, without any fault on the part of plaintiff, strayed upon defendant's track, and that it was struck and killed at a point where the railroad passed along, through and adjoining enclosed and cultivated fields, and that at that point defendant had failed to build and maintain lawful fences to prevent said animal from straying on its track. *Held*, sufficient. *Terry v. The Missouri Pacific Railway Company*, 254.
5. — : —. In such an action if the complaint is sufficient and the facts warrant a judgment for the plaintiff, the judgment will not be set aside because the instructions do not require the jury to find that the injury was occasioned by the company's failure to fence. *Ib.*
6. **NOTICE TO CORPORATION : ON WHAT OFFICERS SERVED.** In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer, whose official relation to the governing body, or managing agent, or chief officer, would make it his duty to communicate the notice, will be sufficient. The secretary is such an officer. *Heitzell v. The Chicago & Alton Railroad Company*, 315.
7. **LIEN FOR MATERIALS : LIMITATION.** Where materials are furnished for the construction of a railroad in car-load lots, under separate and independent orders, no lien therefor can be acquired under article 4, chapter 47 of the Revised Statutes of 1879, for such car-loads as were furnished more than ninety days before the filing of the account claimed to be a lien, although others were furnished within that time. *Ib.*
8. — : —. Materials furnished to a contractor for, and used by him in the construction of, a railroad, are to be regarded as furnished to the railroad. *Ib.*

9. **RAILROAD TRACK IN PUBLIC STREET: LIABILITY OF COMPANY FOR DAMAGES.** Where a municipality, being authorized by its charter, confers upon a railroad company the right to lay its track in a street, the right is to lay it on the grade of the street. If embankments are raised by the company to lay the track upon, above the grade, the company will be liable to property holders in damages for obstructing the access to their property. *Cross v. The St. Louis, Kansas City & Northern Railway Company*, 318.
10. ———: ———: **PLEADING.** The petition in an action to recover such damages need not allege that the erection of the embankment was unnecessary. *Ib.*
11. **JUSTICES' COURTS: COMPLAINT: RAILROADS: DAMAGE TO CATTLE.** A complaint in a justice's court alleged that plaintiff's cow was killed by a railroad company at a point on its road where by law it was bound to maintain a sufficient fence, and that the company had failed and neglected to maintain such fence at the point where the cow got upon the track and was killed. *Held*, that after verdict these allegations would be deemed to aver sufficiently that the killing was occasioned by the failure to fence. *Kronski v. The Missouri Pacific Railway Company*, 362.
12. ———: ———: **JEOFAILS.** Where the entire record showed that the plaintiff's cow was killed in the township of the justice before whom suit was brought under section 809, Revised Statutes 1879, the want of a specific allegation of this fact in the complaint was held to be cured by defendant's appearance in the circuit court and its participation in a trial upon the merits. *Ib.*
13. **MASTER AND SERVANT: RAILROAD: NEGLIGENCE.** In an action against a railroad company to recover for the death of a locomotive engineer killed while on duty, through the negligence of the train dispatcher, the plaintiff failed to show that the train dispatcher and the engineer were not fellow servants. *Held*, that for this omission the plaintiff was properly non-suited. *Blessing v. The St. Louis, Kansas City & Northern Railway Company*, 410.
14. **RAILROADS: FAILURE TO RING AND WHISTLE: ACTION UPON THE STATUTE FOR DAMAGE TO CATTLE.** To fix upon a railroad company liability under section 38, page 310, Wagner's Statutes, (R. S. 1879, § 806,) for killing cattle, it is not sufficient to show that the cattle were killed by the train at a public crossing, and that the company's servants failed to ring the bell or sound the whistle in approaching the crossing, as required by that section. Evidence must also be given to show that the killing resulted from the failure to ring or whistle. Compare *Alexander v. Hann. & St. Jo. R. R. Co.*, 76 Mo. 494. *NORTON, J.*, dissented. *Braxton v. The Hannibal & St. Joseph Railroad Company*, 455.
15. ———: ———. If the evidence fails to show this, the plaintiff cannot recover by proving other negligence of the company, which, concurring with that omission of duty, occasioned the injury. *Ib.*
16. ———: ———: **ACTION AT COMMON LAW FOR DAMAGE TO CATTLE.** In a common law action against a railroad company for negligently killing cattle, the plaintiff may prove any negligence of the com-

pany tending to produce the injury, including in a case where the killing occurred at a public crossing, failure of the company to ring the bell or sound the whistle. *Ib.*

17. KILLING STOCK: SUFFICIENCY OF COMPLAINT. The complaint in this case, an action upon the statute to recover double damages for killing stock, examined, and *Held* to contain averments sufficient after verdict to show that the stock entered upon the track at a point not within the limits of an incorporated town or city. *Farrell v. The Union Trust Company*, 475.
18. ———: TRUSTEES. The trustee of a railroad company, running and operating in that capacity a railroad within this State, is liable for injuries to animals, under section 809, Revised Statutes 1879. *Ib.*
19. LIEN FOR MATERIALS: SERVICE OF NOTICE. A party seeking to enforce a lien against a railroad for materials furnished in its construction, in the absence of all the officers of the company caused a notice of his claim to be served on a person who had desk-room in the office of the company, but no connection with its affairs. *Held*, that this was not service upon the company, and did not, therefore, fulfill the requirements of section 3202, which makes the service of such notice upon the company an essential prerequisite to a lien. *Heltzell v. The Kansas City, St. Louis & Chicago Railroad Company*, 482.
20. In an action for damages for injuries alleged by the petition to have been occasioned by the negligence of a railroad company in failing to ring a bell or sound a whistle, as required by section 806, Revised Statutes 1879, there was no evidence that the bell was rung or the whistle sounded, and all the testimony on the subject was that neither had been done. *Held*, that an instruction assuming that the negligence charged had been established, would have been justifiable, and that, therefore, an exception to an instruction based upon the hypothesis of negligence, not limited to the failure to ring a bell or sound a whistle, would be disregarded. *Johnson v. The Chicago, Rock Island & Pacific Railway Company*, 546.
21. An instruction that it was the duty of plaintiff when approaching the railroad crossing to stop, look and listen for an approaching train, and that if he did not do so in time to prevent the collision, then the jury must find for defendant, was *held* to be objectionable in not requiring the jury to find as a further condition that plaintiff, by stopping, looking and listening, could have discovered the train in time to have avoided the collision. *Ib.*
22. LIABILITY FOR KILLING STOCK: COMPLAINT. In an action against a railroad company for killing stock, founded on the 43rd section of the Railroad Law, (R. S. 1879, § 809,) it is sufficient that the complaint allege the requirements of the statute in respect to the maintenance of fences and cattle-guards, the negligent failure to maintain the same, and that the killing was occasioned by such failure: it is not necessary to allege that the defects complained of were permitted to remain longer than was necessary, by the exercise of reasonable diligence, to discover and repair them. *Chubbuck v. The Hannibal & St. Joseph Railroad Company*, 591.

23. **CONTRACTS LIMITING LIABILITY OF COMMON CARRIERS.** A written contract, containing provisions limiting the liability of a railroad company, as a common carrier, in the transportation of cattle; *Held*, in the absence of fraud or mistake, to be the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the cattle were loaded into the cars with a previous verbal understanding as to the terms of shipment, and presented to him for signature when there was no sufficient time for its examination before the departure of the train. Compare *Dawson v. The St. L., K. C. & N. Ry Co.*, 76 Mo. 514. *The St. Louis, Kansas City & Northern Railway Company v. Cleary*, 634.
24. **DAMAGES FOR THE EJECTION OF PASSENGERS: PLEADING.** In an action based upon an alleged unlawful removal of plaintiff from defendant's train, he cannot recover damages for the manner in which it was effected, if it is found to have been justifiable. *Logan v. The Hannibal & St. Joseph Railroad Company*, 663.
25. **JUNCTION WITH ANOTHER ROAD: STATION: PASSENGERS.** A railroad company owes no duty to a passenger on its road to stop the train at a station because a junction is there made with another road, unless he desire to be transferred to a train on such other road, in which case alone the statute, (G. S., p. 340, § 29,) is applicable. *Ib.*
26. **PASSENGERS: ROUND-TRIP TICKETS.** A railroad company owes no duty to a passenger to stop the train at a station where, by its rules and regulations, such train is forbidden to stop, by reason of the mere fact that he has purchased a round trip ticket from such station to another, and on his return presents the same to the conductor and demands that the train should be stopped at such station. *Ib.*
27. ———: ———: **PLEADING.** Where a petition alleged that the plaintiff entered a train by virtue of a round trip ticket from one station to another and return, and this allegation was denied by the answer, it was *held* that it might be shown that under the rules and regulations of the company, plaintiff had no right by reason of such ticket to enter such train, and that he was so informed by defendant's agent when the ticket was purchased; that such evidence was relevant to the issue, such ticket not purporting to be a complete contract; and that it was not necessary to such issue that the rules and regulations should have been pleaded. *Hicks v. H. & St. Jo. R. R. Co.*, 68 Mo. 329, distinguished. *Ib.*
28. **EXEMPLARY DAMAGES FOR THE EJECTION OF PASSENGERS.** A passenger is not entitled to exemplary damages for an ejection from a railroad train where the conductor acts in good faith, with no malice to the passenger, and uses only such force as is necessary for his removal, although he may be mistaken as to his duty and the plaintiff's rights. *Ib.*
29. **PASSENGER REFUSING TO PAY FARE.** A passenger refusing to pay fare beyond a certain station, at which he has no right to require the train to be stopped, may, before such station is reached, be lawfully removed at the station nearest thereto at which, under the company's regulations, such train is permitted to stop. *Ib.*

30. SEPARATE OPINION BY NORTON, J., concurring, upon the sole ground of error by the trial court in refusing to receive evidence that plaintiff, after purchasing his ticket and before entering the train, was informed by defendant's agents that it did not entitle him to ride in the train from which he was ejected. *Ib.*

— TAXATION OF RAILROADS. *The State v. The St. Louis, Kansas City & Northern Railway Company*, 202.

RAPE.

1. INDICTMENT FOR. An indictment for rape need not contain an express averment that the party injured is a woman. The sex may be otherwise indicated, as by the use of the pronoun "her," and this though the christian name may be one ordinarily given to males, as *Francis* for *Frances*. *The State v. Hammond*, 157.
2. SUBSEQUENT assent of the woman, as by asking compensation, will not purge the guilt of rape. *Ib.*
3. EVIDENCE. On a trial for rape the court refused to permit a witness who was present when the alleged offense was committed, to testify whether the woman objected or not. *Held*, error. *Ib.*

RECORD OF DEEDS.

1. SEAL OF OFFICER. Where a record of a deed shows a scroll affixed to a notary's certificate of acknowledgment, it will be admissible in evidence, though there is no recital either in the body of the certificate or in the testimonium clause thereof that the certificate is given under seal. *The City of Kansas v. The Hannibal & St. Joseph Railroad Company*, 180.
2. ——. A recorder's certificate is not sufficient proof of a copy, where the original was improperly admitted to record. *Hoskinson v. Adkins*, 537.

RECOUPMENT.

See *Emery v. The St. Louis, Keokuk & Northwestern Railway Company*, 339; *Branson v. Turner*, 489.

REPLEVIN.

1. REPLEVIN: SURETIES. If a surety in a replevin bond given by an administrator pay a judgment in the action against the administrator, he will be entitled to recover the amount from the sureties in the probate bond of the administrator. *The State to the use of Walsh v. Farrar*, 175.



2. **PURCHASE PARTLY FRAUDULENT.** Where a purchaser pays part of the price before he has notice of the intent on the part of the vendor to defraud creditors by the sale, he is entitled to be protected to the extent of such payment. How such indemnity may be effectuated in the statutory action, in the nature of replevin, is considered. *Dougherty v. Cooper*, 528.

RES ADJUDICATA.

SEE JUDGMENT.

ST. LOUIS.

— **PUBLIC SCHOOLS IN; POWERS OF SCHOOL BOARD.** Board, etc., v. Woods, 197; Roach v. Board, etc., 484.

SCHOOLS.

1. **SCHOOL BOARD: ITS POWER TO TAKE SECURITY.** The board of public schools of the city of St. Louis may lawfully take from a builder contracting for the erection of a school house for the board, a bond for the security of those who may do labor or furnish materials upon the building, and in case of failure of the contractor to pay for any labor done or material furnished upon the building, may enforce the same by action. *The Board of President and Directors of the St. Louis Public Schools v. Woods*, 197.
2. **ST. LOUIS: "COMMON SCHOOLS."** The Board of President and Directors of the St. Louis Public Schools has control over its school funds unaccompanied by any conditions as to the kind of schools which it shall maintain, or the character and nature of the studies which it shall prescribe or allow.
In the legislation of this State, the phrase, "common schools," means schools open and public to all, rather than schools of any definite grade, and the term "school," by and of itself, does not imply a restriction to the rudiments of an education. *Roach v. The Board of President and Directors of the St. Louis Public Schools*, 484.
3. **PUBLIC SCHOOLS: LIMITATION AS TO AGE OF PUPILS.** The first section of article 10 of the Constitution of 1875, requires instruction to be given gratuitously to all persons in the State between the ages of six and twenty years. The sixth section declares that the public school fund "shall be faithfully appropriated for establishing and maintaining the free public schools * * * in this article provided for, and for no other uses or purposes whatever." *Held*, that the two sections, construed together, require free public schools for all persons between the ages of six and twenty years, but prohibit gratuitous instruction from the public school fund to children under the age of six years. *Ib.*

SCHOOL FUND MORTGAGE, FORECLOSURE OF. Wilcoxon v. Osborn, 621.

SCIRE FACIAS.

— MODE OF SERVICE: INFORMALITY IN. *Andrews v. Buckbee*, 428.

SEAL.

See *Kansas City v. Hannibal & St. Joseph Railroad Company*, 180.

SET-OFF.

NEGOTIABLE PAPER: SET-OFF. A negotiable promissory note transferred after maturity passes into the hands of the indorsee subject only to such equities and defenses as are connected with the note itself, not such as grow out of distinct and independent transactions. The statute of set-off, (R. S. 1879, § 3868,) is not applicable to negotiable paper. Overruling *Munday v. Clements*, 58 Mo. 577. *Cutler v. Cook*, 388.

SHERIFF.

1. **LIABILITY FOR FALSE RETURN: AMENDMENTS.** Under the statute, (R. S. 1879, § 2401,) an officer to whom an execution is delivered, in case he makes a false return on the writ, is liable for the whole amount of money directed to be levied. *Held*, that where the falsity consisted in stating that the writ was ordered to be returned satisfied by plaintiff's attorneys, an amendment by leave of court striking out the false statement was no defense to an action for the false return.

Corby v. Burns, 36 Mo. 194, distinguished on the ground that in that case the amendment was in conformity with the facts. *The State ex rel. Ross v. Case*, 247.

2. —: **INSOLVENCY.** A plea of insolvency of defendant in the execution, is no defense to an action against a sheriff and his sureties upon his official bond for making a false return. *Ib.*
3. **FAILURE TO RETURN: DAMAGES.** Where no damages are proven, a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law. *Ib.*

SHERIFF'S SALE.

A sale by the sheriff under a school mortgage made in vacation of the circuit court, is void, both in direct and collateral proceedings. *Wilcoxon v. Osborn*, 621.

SIGNIFICATION OF TERMS.

"ACCOUNT FOR." See *The State ex rel. McKown v. Williams*, 463.

"AND." See *Loewer v. The City of Sedalia*, 431.

"COMMON SCHOOLS." See *Roach v. The Board of President and Directors of the St. Louis Public Schools*, 484.

"LOANING OUT." See *The State v. Rubey*, 610.

"MISTAKE." See *Fretwell v. Laffoon*, 26.

"SURPRISE." See *Fretwell v. Laffoon*, 26.

SPECIAL TAX BILLS.

SPECIAL TAXES. Personal property cannot be taken to pay a special tax for the improvement of real estate; and if it appear by the tax-book that the tax is for that purpose, the collector will be liable if he levies on personalty to enforce it. *Higgins v. Ausmuss*, 351.

STATE LUNATIC ASYLUM.

1. A BOND payable to the "Treasurer of the State Lunatic Asylum," without naming the incumbent, is good. *Treasurer of the State Lunatic Asylum v. Douglas*, 647.
2. A BOND is not void because the names of the obligors do not appear in the body of it. *Ib.*
2. STATE LUNATIC ASYLUM: BLANK BOND. The obligors in a bond given to the treasurer of the State Lunatic Asylum bound themselves "to pay to said treasurer, or his successors in office, the sum of ——— dollars per week for the board of " a patient. *Held*, that the omission to fix the rate of board per week did not invalidate the bond. The law would imply a reasonable rate; and under the statute, (G. S. 1865, p. 305, § 9,) a statement certified by the superintendent of the asylum, would be *prima facie* evidence of the amount due. *Ib.*
4. ———: ATTORNEY'S FEE. In a suit on a bond for the board of a patient at the State Lunatic Asylum, the court is authorized to tax as costs, a reasonable fee for the attorney of the asylum. *Ib.*

STATUTES.

IMPLIED REPEAL BY REVISION. A statute revising the whole subject matter of a former statute and evidently intended as a substitute for it, although it contains no express words to that effect, repeals the former. *The State v. Roller*, 120.

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STATUTE OF FRAUDS.

1. PERFORMANCE OF PAROL CONTRACT. In a suit upon notes given by defendant to plaintiff for land, afterward sold under a power of sale contained in a mortgage securing payment thereof, and bid in by plaintiff, it is a good defense to establish a parol agreement by the plaintiff to cancel the notes in consideration that defendant surrender to plaintiff the possession of the land, and a surrender and acceptance of possession in pursuance of the agreement. *Russell v. Berkstresser*, 417.
2. VENDOR AND VENDEE: EXECUTED CONTRACT: CONSIDERATION. The surrender of the possession of real estate by the vendee and its acceptance by the vendor, will be held to extinguish the vendee's liability for the purchase money, where such was the agreement between the parties. *Id.*

STREETS.

SEE MUNICIPAL CORPORATIONS.

SUNDAY.

—— GIVING AWAY LIQUOR ON. *State v. Burnett*, 570.

SURPRISE.

—— AS GROUND FOR A NEW TRIAL. *Fretwell v. Laffoon*, 26.

SWAMP LANDS.

1. SWAMP LANDS, CONVEYANCE OF. Even if it be true that under the laws in relation to swamp lands, as they stood in 1860, the Governor and not the county commissioner, was the proper officer to execute deeds to such lands, yet when the commissioner executed a deed, if the county received the purchase money, the equitable title vested in the purchaser, and the curative act of 1868, (Acts 1868, p. 67,) passed the legal title to him. *Wilcoxon v. Osborn*, 621.
2. A COUNTY having received the purchase money for a tract of swamp land, caused a deed to be made to the purchaser by the county commissioner. On the same day the county made a loan of school funds, taking as security a mortgage on the land. Subsequently the county caused the mortgage to be foreclosed. The defendant in this case derived title through this foreclosure. *Held.*

that, as against the heirs of the original purchaser, the defendant was estopped to deny the validity of the commissioner's deed. *Ib.*

TAXES.

1. PAYMENT OF WATER LICENSE UNDER COMPELSION. Payment of a water license under a threat of turning off the water in case of continued refusal, is payment under compulsion, and if the charge is excessive, the excess may be recovered; and that without tendering the amount really due. *Westlake & Button v. The City of St. Louis*, 47.
2. ———: TENDER. Tender of the true amount due for a license is not essential to authorize recovery of the excess paid where it is apparent from the language used, that the tender would not be accepted. *Ib.*
3. ILLEGAL ASSESSMENT AND LEVY OF TAXES: LIABILITY OF COLLECTOR. The charter of a town provided for the levying of taxes by ordinance of the council, the rate not to exceed one-half of one per cent. An ordinance made it the duty of the assessor to make the assessment after the 1st day of May in each year, and provided that his valuation could be corrected by the council on the appeal of a tax-payer, and further, that the tax-book should be returned to the council, to remain for the inspection of all persons interested; that thereafter the clerk should transfer to a "delinquent tax-book" the lots on which taxes were unpaid, and that by the delinquent tax-book the collector should be authorized to seize and sell property. In the present case the assessment was made in April; at a meeting of the council the valuation of the property of a tax-payer, who did not appeal, was increased, and by this increase his tax was made to exceed the legal rate on the assessor's valuation; the tax was then levied by a resolution of the council; the original tax-book was not returned to the council, nor a delinquent book prepared, but by resolution the council ordered that the original tax-book be turned over to the collector as the delinquent tax-book, and this was done. The collector having seized and sold the property of the above mentioned tax-payer to satisfy the tax so levied, he brought this action on the collector's bond. *Held*, that the council had no jurisdiction to make the levy by resolution; that the substitution of the original for the delinquent tax-book was illegal; that as process it was void, and that the collector was bound to take notice of the defects, and was liable as a trespasser for his proceedings under it. *The Town of Warrensburg ex rel. Colbern v. Miller*, 56.
4. ASSESSMENT AS EVIDENCE OF OWNERSHIP. Where a statute provided that the tax-book should be received as evidence of all the facts stated therein, *Held*, that in a suit against H., grantee of J., to enforce the lien of certain taxes, the assessment of the property to J. would be evidence of the ownership of H. *The City of Kansas v. The Hannibal & St. Joseph Railroad Company*, 180.
5. ACTION TO RECOVER: PROPER DEFENDANT: JUDGMENT AGAINST THE LAND. In a proceeding by the City of Kansas, under its charter, to enforce against land a lien for taxes due thereon, all persons

having an interest in the land at the commencement of the suit should be made defendants. If any one be made defendant, who has no interest, he must disclaim by answer. But whether he do so or not a judgment for the city would be an error of which he could not complain, since it would be against the land and not against him personally. *Ib.*

6. ———: KANSAS CITY. Under the charter of Kansas City of 1875, the city has a lien on land for interest accrued on delinquent taxes as well as for the taxes themselves. *Ib.*
7. TAXATION OF RAILROADS: NORTH MISSOURI RAILROAD. Until the act of March 10th, 1871, providing a uniform system of assessing and collecting taxes on railroads, railroad property was not by the general law subjected to taxation *in specie*. The only form of taxation provided for was a tax against the share-holders upon their shares; and for this there was no lien on the property of the company: This was the mode of taxation applicable to the North Missouri Railroad Company. NORTON, J., dissented. *The State v. The St. Louis, Kansas City & Northern Railway Company*, 202.
8. ———: BACK TAXES: INNOCENT PURCHASER. A general act provided for the levying of taxes on railroad property for back years. After its passage the North Missouri Railroad changed ownership. Its property had not been subjected to taxation during those years. After the purchase a levy was made under the new act. *Held*, that as against the new owner the levy was of no validity. He was an innocent purchaser, and the act was retrospective and void as to him. NORTON, J., dissented. *Ib.*
9. ———: NORTH MISSOURI RAILROAD. The act of March 17th, 1868, amending the charter of the North Missouri Railroad Company did not have the effect of subjecting the property of that company to taxation as real and personal property. It made it liable to be so taxed; but nothing in the act changed the method of taxation provided by the general revenue law, which was a tax against the share-holders on their shares. *Ib.*
10. ———: TAXATION PREVIOUS TO 1872. The special board of equalization created by the act of March 10th, 1871, was not authorized by that act to levy taxes for the year 1871, or previous years on the real and personal property *in specie* of any corporation which had not before that act been subjected to taxation in that form. *Ib.*
11. JEFFERSON CITY: TAXES, ACTION FOR. Under the charter of the City of Jefferson, as revised in 1872, (Sess. Acts 1872, p. 393, § 14,) the city may maintain a personal action for taxes against any person in whose name any taxes are assessed, if he was the owner of the property taxed at the time of the assessment. *The City of Jefferson v. Curry*, 230.
12. PRACTICE. Judgments against one of several defendants are expressly authorized by section 3673, Revised Statutes. *Ib.*
13. SPECIAL TAXES. Personal property cannot be taken to pay a special tax for the improvement of real estate; and if it appear by the tax-

book that the tax is for that purpose, the collector will be liable if he levies on personalty to enforce it. *Higgins v. Ausmuss*, 351.

14. **ALTERATION OF TAX-BOOKS.** A tax-book altered by the collector by the addition of an item of taxes not on it when the book came into his hands, is void as to that item, and will not protect him in enforcing its collection. *Ib.*
15. **MORTGAGE: PAYMENT OF TAXES BY MORTGAGEE.** If the mortgagee fail to pay the taxes on the mortgaged premises, the mortgagee may pay them, and claim the benefit of the lien of the mortgage as security for the amount. But his claim must be enforced as a part of the mortgage debt, and not by an independent action against the mortgagee, as for money paid to his use, or under claim of subrogation to the lien of the State or municipality. *Horrigan v. Wellmuth*, 542.
16. **MORTGAGE, EXTINGUISHMENT OF.** Payment of the debt secured by a mortgage, will not extinguish the lien of the mortgage as a security for taxes properly paid by the mortgagee. *Ib.*
17. **COPIES.** A copy is not admissible in evidence, unless the absence of the original be accounted for. *Hoskinson v. Adkins*, 537.

TENDER.

TENDER OF TAXES. Tender of the true amount due for a license is not essential to authorize recovery of the excess paid where it is apparent from the language used, that the tender would not be accepted. *Westlake & Button v. The City of St. Louis*, 47.

TITLE TO REAL ESTATE.

CASE "INVOLVING TITLE TO REAL ESTATE;" APPEAL. Where the petition asserts a trust in plaintiff's favor in respect to lands held by defendant, and prays that the title to the lands be divested out of defendant and vested in plaintiff, the case is one "involving title to real estate" within the meaning of section 12, article 6 of the constitution, and an appeal lies from the St. Louis court of appeals to the Supreme Court. *Baier v. Berberich*, 413.

TOWNSHIP.

TOWNSHIP FUNDS. *The State v. Rubey*, 610.

TRESPASS.

UNLAWFUL DETAINER: WASTE. The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled

may recover as well the waste and injury committed as the possession. *Hawkins v. Roby*, 140.

TRUSTS AND TRUSTEES.

1. NATIONAL BANKS. To avoid the supposed effect of certain provisions of the National Banking Act, a national bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee for a receiver of the bank, so far from being a fraud upon his individual creditors, was an execution of the trust which, if it had been refused, a court of equity would have compelled. *Wherry v. Hale*, 20.
2. ——— : TRUSTEES. The trustee of a railroad company, running and operating in that capacity a railroad within this State, is liable for injuries to animals, under section 809, Revised Statutes 1879. *Farrell v. The Union Trust Company*, 475.
3. TRUSTEE OF AN EXPRESS TRUST: CONSIGNOR SUING AS SUCH. The plaintiff, having sold land as agent of the owner and received the purchase money, delivered the latter to an express company for transportation to the owner. It was lost in transit. *Held*, that the plaintiff could maintain an action for its recovery. He was the "trustee of an express trust," within the meaning of section 3463, Revised Statutes 1879. *Snider v. The Adams Express Company*, 523.
4. RESULTING TRUSTS. The evidence essential to the creation of a resulting trust, must show the contract clearly and unequivocally, so as to leave no room for reasonable doubt.
Such a trust will arise in favor of a third party when he furnishes the purchase money and the party in whom the title is placed is a mere volunteer. *Forrester v. Moore*, 651.

FRAUDULENT TRUSTEES. *Pomeroy v. Benton*, 64; *Bulkley v. Big Muddy Iron Company*, 105.

VENDOR AND VENDEE.

EXECUTED CONTRACT: CONSIDERATION. The surrender of the possession of real estate by the vendee and its acceptance by the vendor, will be held to extinguish the vendee's liability for the purchase money, where such was the agreement between the parties. *Russell v. Berkstresser*, 417.

VENDOR'S LIEN.

WAIVED BY TAKING OTHER SECURITY. When a mortgage or deed of trust is taken on the land conveyed for a part of the unpaid purchase money, the vendor's lien for the remainder of such unpaid purchase money is thereby waived, unless it is expressly stated in such mortgage or deed of trust that the lien is not waived. *Briscoe v. Callahan*, 134.

WAIVER.

— OF VENDOR'S LIEN. *Briscoe v. Callahan*, 134.

WASTE.

UNLAWFUL DETAINER: WASTE. The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled may recover as well the waste and injury committed as the possession. *Hawkins v. Roby*, 140.

WARRANTY.

WARRANTY OF CHATTELS: OBVIOUS DEFECT. Though a defect be obvious a vendor may warrant against it; especially where the nature and extent of the disorder is lurking, and may reasonably be supposed to be more within the knowledge of the vendor than the vendee. Thus, where the subject of a sale was a yoke of oxen, one of which had a sore on his neck, and the vendor gave the assurance that "that don't hurt him; it is almost well," and the vendee took them on this assurance, without seeing them; *Held*, that this amounted to a warranty. *Branson v. Turner*, 489.

2. —: BREACH OF WARRANTY. Where there is a breach of warranty, the vendee may return the property and rescind the contract within a reasonable time, or he may retain it and when sued for the purchase money plead a total or partial failure of consideration. *Ib.*
3. —: —: RECOUPMENT. Notwithstanding a breach of warranty, if the property is not returned the vendor may maintain an action for the purchase money, but the vendee will be entitled to recoup the amount of the diminution in value. *Ib.*
4. —: —: BURDEN OF PROOF. In an action on a contract of sale with warranty to recover the purchase money, the burden is not on the vendor to show fulfillment of the warranty, but on the vendee to show a breach if he alleges it. *Ib.*
5. —: —: FRAUD. To make out a breach of warranty, it is not necessary to show that the representations of the warrantor were fraudulent or that they actually deceived and misled the warrantee. *Ib.*
6. EXPERT TESTIMONY. Whether or not a sore on the neck of an ox, renders him unfit for beef, is a proper question for expert testimony. *Ib.*
7. WARRANTY. Where a vendor of oxen warranted them fit for either beef or work, unfitness for either, is a breach of the warranty,

whether the vendee designed to use them for that purpose or not. *Ib.*

8. COVENANT OF WARRANTY: DAMAGES RECOVERABLE UPON BREACH. The general rule is that for a breach of covenant of seizin and warranty, the measure of damages is the purchase money with interest. But where the covenantee has had possession and use of the premises he can recover no interest for any period prior to his eviction without proof that he has responded to his evictor for mesne profits, and then only for such period as he shall have so responded, which, under our statute of ejectment, (R. S. 1879, § 2252,) can in no case be longer than five years. *Hutchins v. Roundtree*, 500.
9. ———: COSTS. There is no question of the right of a covenantee evicted by law to recover the costs of the suit if he gave notice of its pendency to the grantor or his legal representative. *Ib.*

WILLS.

1. ADMINISTRATION: WIDOW'S ALLOWANCE: WILL. The husband has no power by will to dispose of the articles which by section 33, page 88, Wagner's Statutes, are allowed to the widow as her absolute property. *Hasenritter v. Hasenritter*, 162.
2. ———: ———: ———. A provision in the will of the husband in favor of the wife, will never be construed by implication to be in lieu of dower or any other interest in his estate given by law: the design to substitute one for the other must be unequivocally expressed. *Ib.*
3. CONTINUATION OF PARTNERSHIP BY WILL. A clause in a will providing for the continuation of a firm of which the testator was a member, does not, of itself, continue the old firm or create a new one. To give it effect, the surviving partner must assent and continue the business with that understanding and intention. *The Exchange Bank v. Tracy*, 594.

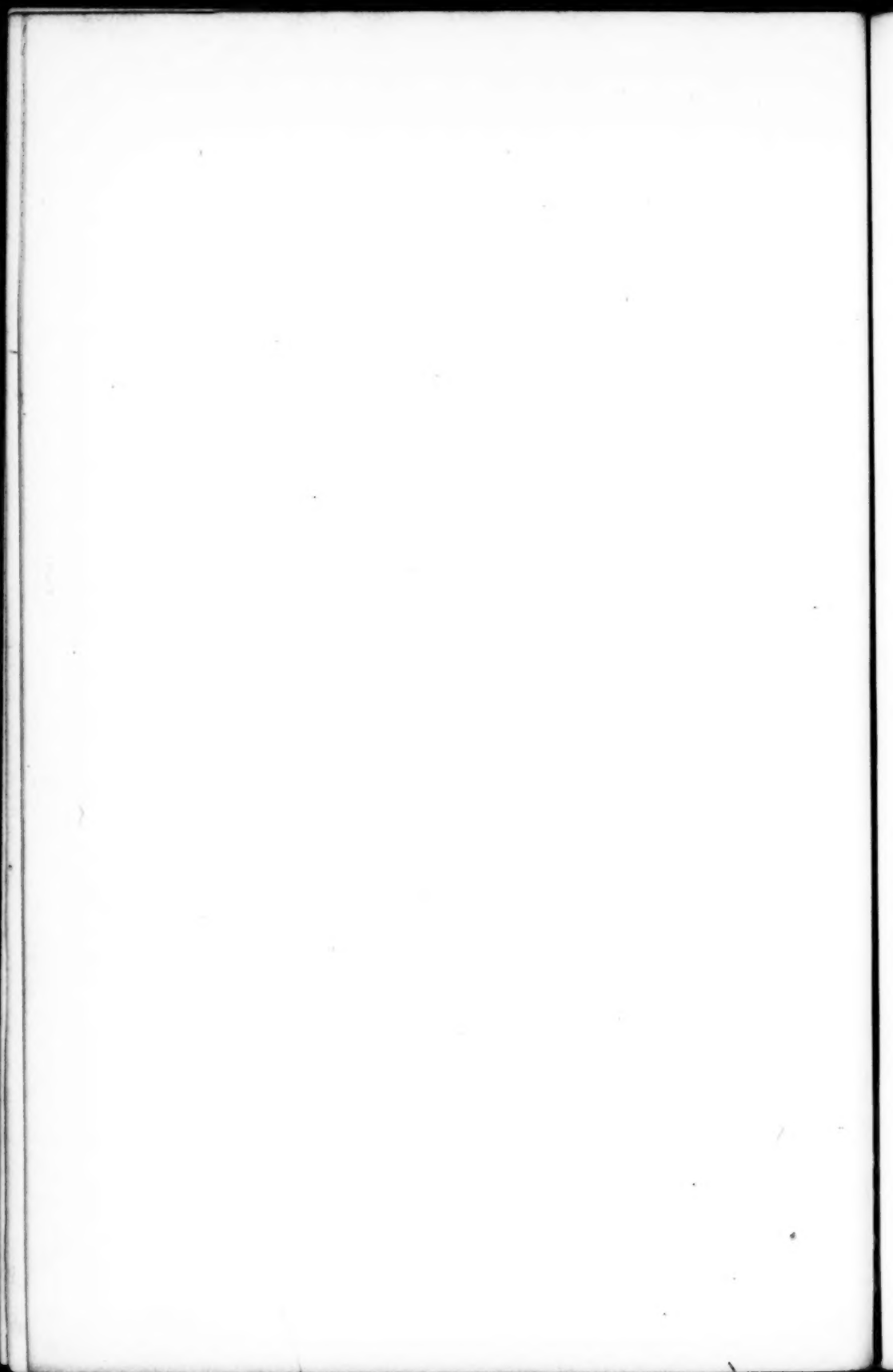
WITNESS.

1. PROVING TESTIMONY OF DECEASED WITNESS. The court permitted witnesses to state the substance of the testimony of the prosecutrix given at the preliminary examination, she having since died. *Held*, no error. *The State v. Hammond*, 157.
2. DEATH OF ONE PARTY TO CONTRACT: COMPETENCY OF ANOTHER AS A WITNESS. Where one of two parties jointly bound by a contract is dead, the adverse party is not thereby disqualified as a witness in an action upon the contract between himself and the survivor. *Nugent v. Curran*, 323.
3. ———: ———. In an action by the payee against a surety in a note, the surety pleaded and at the trial testified to facts constitut-

ing an estoppel against the plaintiff, with which, nowever, the principal had no connection. The principal was dead. *Held*, that this fact did not disqualify the plaintiff from testifying in his own behalf. *Ib.*

4. WITNESS, IMPEACHMENT OF. An impeaching witness cannot be asked whether he would believe the former witness on oath; and it is specially objectionable to ask him whether from his own knowledge of the former witness he would believe him on oath. The inquiry should be as to his general reputation for truth and veracity in the community in which he lives. *The State v. Rush*, 519.

CHILD AS A WITNESS. *The State v. Jefferson*, 136.



RULES FOR THE GOVERNMENT
OF THE
SUPREME COURT OF MISSOURI,

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motion to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four

hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing Instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such

fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall

be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts to be filed.

RULE 15. In all civil cases the appellant or plaintiff in error shall file in this court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision. The appellant or plaintiff in error shall also deliver a copy of said extract to the attorney of the appellee or the defendant in error, ten days before the day on which the cause is docketed for hearing, and if the counsel for the appellee or defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect or unfair, he may within eight days after receiving the same, deliver to the counsel of the appellant or plaintiff in error one copy, and to the clerk of this court seven copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision, and hereafter the evidence of the service of such abstracts shall be filed with the same.

Briefs to be filed.

RULE 16. It shall be the duty of counsel in all cases to file with the clerk, on the day next preceding the day on which the cause is docketed for hearing, seven copies of a brief which shall contain a clear and concise statement of the matters in issue, and a further statement, in numerical order of the points or legal propositions intended to be relied on in argument, accompanied by a citation of authorities supporting each proposition. To this may be added such argument as counsel may desire to make in writing; all of which shall be signed by counsel.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume

and the page where the same will be found ; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error ; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed ; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or

with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not of *itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878.*)

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878.*)

RULE 26. A party, in any cause, filing a motion either

to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879.*)

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